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CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT OF ALABAMA,

DURING

THE JUNE TERM, 1852.

REPORTED BY

J. W. SHEPHERD.

40581

VOL. XXI.

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OFFICERS OF THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

UNTIL DECEMBER 6, 1852,

HON. E. S. DARGAN, CHIEF JUSTICE.
HON. WM. P. CHILTON,
HON. DAVID G. LIGON,
HON. GEORGE GOLDTHWAITE,
HON. JOHN D. PHELAN.
} Associate Justices.

AFTER DECEMBER 6, 1852,

HON. WM. P. CHILTON, CHIEF JUSTICE.
HON. DAVID G. LIGON,
HON. GEORGE GOLDTHWAITE,
HON. JOHN D. PHELAN,
HON. LYMAN GIBBONS,*
} Associate Justices.

M. A. BALDWIN, ATTORNEY GENERAL.
THOMAS S. MAYS, CLERK.

*Appointed December 6, 1852, by his Excellency, the Governor, to fill the vacancy occasioned by the resignation of DARGAN, C. J.

ERRATA.

In Rowland and Heifner v. Ladiga's Heirs, page 37, second line from the bottom, for "*prevent*" read "*protect.*"

In Pearson v. Darrington, Admr., page 169, fifth head-note, for "*form*" read "*forum.*"

In Ross v. Ross, page 325. third line from the top, for "*Ross*" read "*Burnham.*"

NOTE.—In addition to the cases decided at the regular June term, this volume also contains the opinions delivered at the adjourned term which was held on the first Monday in December, 1852, and several opinions which were delivered at the January term, 1853, in cases submitted at the previous June term.

The reporter deems it proper to say that, in most of the cases, the statement of facts was prepared by the judge who delivered the opinion of the court.

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REPORTS

OF

CASES ARGUED AND DETERMINED

AT JUNE TERM, 1852.

ROWLAND AND HEIFNER *vs.* LADIGA'S HEIRS.

1. A female belonging to the Creek tribe of Indians, whose husband was dead, but with whom a grand-child resided, whose parents were also dead, is "the head of a family" within the meaning of the second article of the treaty of March 24, 1832, between the United States and that tribe of Indians.
2. Every head of a family of that tribe who resided on a half section of land, and selected it as his reservation under the treaty, became thereby entitled to it; and his right could not be divested by the refusal of the locating agent to locate him upon it.
3. The head of a family who made his selection, and was located upon his reservation, could only be divested of his right within five years, by a sale in accordance with the provisions of the treaty, or by abandoning the land; but if he neither sold or abandoned it within that time, his title became perfect and indefeasible.
4. Where an Indian reservee, the head of a family, made application to the locating agent to be located on her reservation, which application was improperly refused, and she continued to reside on the land until interrupted in her possession by intruders, and then went to a relative's to reside, this is not an abandonment of the land, notwithstanding she is afterwards removed from the country by the force of the Government.
5. The right of an Indian reservee, which he has not conveyed by sale, nor lost by abandonment, descends to his heirs at law.
6. When evidence is objected to as a whole, and a part of it is admissible, the objection may be overruled.
7. To show that she was "the head of a family," plaintiff had proved that her grand-child, a boy whose parents were dead, resided with her; and then offered to prove that she bought clothes for him, to which proof defendant objected. *Held:* That the evidence was admissible.
8. If trespass to try title is brought to recover the freehold, and the plaintiff dies pending the suit, it may be revived in the names of his heirs at law.

9. The court may require some evidence of heirship, before allowing the suit to be revived, but its action in reviving without sufficient evidence of the heirship cannot be reviewed in the Appellate Court, even if the revivor is made without any proof at all; for the defendant may contest the heirship upon the trial before the jury.
10. In questions of pedigree, the declarations of deceased members of the family have always been received in evidence, to establish the parentage or descent of the particular individual whose relationship is the subject of investigation.
11. One who has title to land may bring one suit against all the tenants in possession of it, although they may severally possess distinct portions of it; and the defendants may protect themselves from a joint judgment for damages by showing the character and extent of their possession.
12. Where the plaintiff's right to recover depends upon three or more distinct facts, a charge which assumes that he may recover if only two of those facts are established, is erroneous, if unexplained by other instructions; and the judgment will be reversed for the error, although the bill of exceptions recites that "other charges were given," which are not set out.

(Phelan, J., *dissenting*, held, that if an affirmative charge touching the merits of the action is correct, it should not be held erroneous because it does not likewise embrace formal and technical matters, unless exception is taken in the court below for that reason.)

ERROR to the Circuit Court of St. Clair.

Tried before the Hon. John D. Phelan.

This was an action of TRESPASS, brought by Sally Ladiga, a Creek Indian, against Richard D. Rowland and Peter Heifner, to try titles to the east half of section two, in township fourteen, range eight east, of the Coosa Land district. The suit was commenced in the Circuit Court of Benton county; and a trial was there had, at the April term, 1846, which resulted in a verdict for the defendants; but a new trial was granted, and the venue was changed to the county of St. Clair, on the condition that the plaintiff paid all the costs that had accrued, by the first day of August then next following.

At the May Term of the Circuit Court of Benton, an entry was made upon the record, showing that the clerk had failed to transmit the papers, as he had been directed, to the Circuit Court of St. Clair; and the order for the change of venue was renewed, and the clerk directed to transmit all the papers and orders in the cause. At the September Term, 1847, the plaintiff moved the Circuit Court of St. Clair, to have the cause entered upon the docket of that court, as one there

pending, and produced the papers and orders showing the change of venue. The defendants resisted this motion, on the ground that the cause had been finally disposed of by the Circuit Court of Benton; but the court granted the motion, and the defendants excepted.

At the March Term, 1849, the death of the plaintiff, Sally Ladiga, was suggested, and the present defendants in error moved the court to revive the suit in their names as her heirs at law; and in support of the motion, they offered in evidence the deposition of one Frye, and also proved the common reputation among the Indians that they were the children and grand-children of said Sally Ladiga. The defendants objected, that the evidence was insufficient to establish their heirship; but the court, deeming it sufficient, granted the motion, and ordered the suit to be revived in the names of the present defendants in error as plaintiffs, and informed the defendants that they might contest the heirship of the plaintiffs, either by special plea in bar, or under the general issue before the jury.

A trial was then had, upon the plea of "not guilty," pleaded separately by each defendant, and a verdict of "guilty" was rendered against them, and five dollars damages assessed against each; and it was further found by the verdict, that the defendant Rowland was in possession of the north east quarter of said half section of land, and the defendant Heifner in possession of the south east quarter. The plaintiffs remitted the damages assessed by the jury, and the court rendered judgment in their favor, that they recover of said defendants the land in their declaration mentioned, and the costs of suit.

During the trial a bill of exceptions was taken, which shows, that Sally Ladiga was a Creek Indian, and had been enrolled as one of that tribe by the agent of the General Government, under the treaty of March 24, 1832; that she resided on the land in controversy, both before and after that treaty, and had a cabin upon it, and also a field; that she had no husband living at the date of the treaty, but that she had raised a family of children, all of whom had married and settled off to themselves; that the only persons who resided with her were, an Indian woman named Letter and

her child, and also a boy named Ar-chee-chee; that Sally claimed this boy as her grand-son, and there was proof tending to show that he was such, and that his parents were dead. The proof also tended to show, that Ar-chee-chee resided with Sally, both before and after the treaty; but there was a conflict in the evidence, as to whether he was related to her or not. The Indian woman Letter was not related to Sally, but lived with her, and cultivated her field for her; and it further appeared, that Letter had been located under the treaty as "the head of a family," upon a half section of land.

The testimony also showed, that Sally Ladiga applied to the locating agents of the Government, and claimed to be located as "the head of a family," on the half section of land in controversy; but her application was refused, on the ground that she was not "the head of a family." Her first application was made to M. M. Houston, a locating agent, who testified in this cause, that he determined upon evidence satisfactory to him that she was not entitled to a half section of land, as the head of a family under the treaty. After failing in her application to Houston, she applied to other locating agents, all of whom rejected her claim. She continued, however, to reside upon the land, until 1833 or 1834, when, in consequence of some difficulty that arose between her and one Smith, who, it appears, entered upon the land, and opened a field including her cabin and field, she left the place, and went to reside with a relative. Some time, however, in 1838, she was found by a soldier of the United States army, occupying a shelter upon or near the land, and was carried by him to an emigrating company about to start west, and then at Ross' Landing; and in the fall of that year, she did start with said company to Arkansas, but never reached the west bank of the Mississippi river.

There was also proof tending to show, that some of the white settlers used their influence with Houston, the locating agent, to prevent the allowance of her claim, by representing, and expressing their opinion, that she was not the head of a family; and there was also evidence going to show that the boy Archeechee was not relatedto her; that on one occasion, she represented the Indian woman Letter to be a part of her family, although she was not related to her, and had herself

been located on a half section of land as the head of a family; that she had also presented to the agent her children, as parts of her family, although they were married, and settled off to themselves; and that the boy Archeechee and the Indian woman and her child were the only persons living with Sally at the date of the treaty.

There was also a conflict in the evidence, as to the manner in which Sally came to the camp of the emigrating company, some of it going to show that she joined the company willingly and of her own accord; this proof was introduced by the defendants. It was proved by one Goodwyn, a witness introduced by the plaintiffs, that in March, 1832, Sally bought some clothes from him for the boy Archeechee, and told witness that he was the same boy witness had seen with her once before in the year 1831. The defendants objected to this testimony of Goodwyn's; but their objection was overruled, and they excepted.

There were also several other objections made to parts of the evidence introduced, which were overruled; but it is not thought necessary to state them.

The defendants introduced, as evidence of their title to the land, two patents from the President of the United States, which show, that the half section of land in controversy had been selected and sold, under the provisions of the treaty, for the benefit of the orphan children of the Creek tribe. The patent for the north east quarter section was issued to Rowland, and the patent for the south east quarter to Heifner; and the proof showed, that each defendant occupied the quarter section which had been granted to him.

Upon this state of proof, the bill of exceptions recites, that "among other things, the court charged the jury as follows: That if each of the defendants was in possession of a different quarter section of the half section of land in controversy, and each claimed title to the quarter section in his possession, and there was no connection between the possession or title of the two defendants; and if they find that Sally Ladiga was entitled to the land, as a reservation under the Creek treaty of 1832, they must return a verdict for the possession of each quarter section separately, against the defendant in possession of the same."

The defendants asked the court to charge the jury:

1. That if they believed from the evidence, that defendants Rowland and Heifner owned and possessed different quarters of the half section of land in controversy, and that Rowland never owned, possessed, or had any connection with the possession of the south east quarter, nor Heifner with the north east quarter of the land sued for, they must find for the defendants;

2. That if they believed from the evidence, that defendants owned and possessed different quarters of the half section of land in controversy, and that Rowland never owned, possessed, or had any connection with the possession of the south east quarter, nor Heifner with the north east quarter, then plaintiffs are entitled to a verdict against only one of the defendants, and that must be for the quarter section which such defendant possessed at the commencement of the suit;

3. That if they believed from the evidence, that Rowland and Heifner owned and possessed different quarter sections of the half section of land in controversy; that Rowland never owned, possessed, or had any connection with the possession of the south east quarter, nor Heifner with the north east quarter, then plaintiffs can have a judgment against but one of the defendants, and that must be for the quarter section which such defendant possessed at the commencement of the suit; and the plaintiffs must elect against which one they will proceed for a verdict, and if they do not make such election, then the jury must find for the defendants."

The court refused each one of these three charges, and the defendants excepted to each refusal.

The court charged the jury: "That Heifner and Rowland, as purchasers from the General Government of the United States, could not occupy a more favorable position in this controversy, than the Government itself; that if Houston and the other locating agents, officers of the General Government, refused to locate Sally Ladiga, and rejected her claim, when she applied for the location, then it would not lie in the mouth of the General Government to say, that Sally Ladiga had abandoned her claim to a reservation under the treaty; and that consequently the defendants could not be heard to say, that she had abandoned the land."

Further: "That if it appeared from the evidence, that Houston rejected the claim of Sally Ladiga, after investigation, upon the ground that she was not the head of a Creek family under the treaty, although it may have been shown in such investigation that she had a grand-son, an orphan, living with her, in her house, at and before the date of the treaty, such rejection was entitled to no consideration against the plaintiff's demand in this suit; but if, on the contrary, it appeared that he rejected her claim as the head of a family because it was shown in such investigation that she had no child or grand-child living with her at the date aforesaid, then said rejection was a fact entitled to much consideration, against the plaintiffs and in favor of the defendants;" to the former part of which last charge the defendants excepted.

The plaintiffs in error now assign sixteen errors in the record of the proceedings in the court below, embracing every thing to which exception was taken, in the change of venue, the revivor of the suit, the admission of evidence, the charges given and refused, and the rendition of final judgment. These different assignments of error will be readily understood from the foregoing statement of facts and the brief of the counsel for plaintiffs in error.

S. F. RICE, A. J. WALKER and J. B. MARTIN, for plaintiffs in error :

1. In the action of ejectment or trespass to try titles, the general issue alone is to be pleaded; and under it (as under the general issue in assumpsit,) any thing may be given in evidence, which in law can defeat a recovery in favor of the plaintiff. Wood v. Jackson, 8 Wend. 9, 40. Jackson v. Rowland, 6 Wend 666.

2. It is good in abatement or *in bar*, that the plaintiff was dead at the commencement of the suit. Jenks v. Edwards, 6 Ala. 143.

3. It was erroneous to order the revival of the suit until it was shown *affirmatively* by plaintiffs that Sally Ladiga was alive at the commencement of the suit. And it was also erroneous to give the charges which were given; one of which, at least, asserted plaintiff's right to recover, without referring to the jury the question, whether she was dead at

the commencement of the suit, although it is expressly stated in the bill of exceptions that there was a *conflict* on this and every other branch of the evidence.

4. All proceedings in a suit at law are stopped by the death of the *sole plaintiff*. The order for the change of venue is utterly void, because it was made after the death of the sole plaintiff. Mansony et al. v. Bank, 4 Ala. Rep. 751.

5. The order for change of venue is void for another reason, to-wit: that the Circuit Court of Benton did not intend its final judgment rendered on verdict at its spring term, 1846, should be set aside or its force arrested unless the costs should be paid by the 1st day of August, as a *condition precedent*. The Circuit Court of Benton did not, by implication or otherwise, reserve control of said jndgment beyond the 1st day of August, 1846, and *it could not act upon it after* that time. Edwards v. Lewis, 18 Ala. Rep. 496; Lands v. McClellan, 6 Cowen 582; Noland v. Locke, 16 Ala. Rep. 52; Walker v. Hale, 16 Ala. Rep. 26; Stephens v. Broadnax, 5 Ala. Rep. 258; Crothers v. Ross, 5 Ala. Rep. 800.

6. The failure of the plaintiff to have any action whatever taken by the Benton court in the case at its fall term, 1846, was a discontinuance of the cause or abandonment or waiver of the *conditional offer* of the new trial; and this view is strengthened by the entry at the spring term, 1847, which does not even pretend that the clerk or the court had omitted any duty—thus proving that the only default was the default of the plaintiff. The Circuit Court of Benton had no power to act in the case at *spring term*, 1847, even under the decision of Reese v. Billing, 9 Ala. Rep., where the party complied with the offer for the new trial at the *next succeeding term* according to the terms of the offer and within proper time. Suppose, however, that Billing had failed to comply at the *next succeeding* term after the order, and had waited until the *second term*, (as the plaintiff here did) it is clear the decision would have been different. The order at spring term, 1847, treats the order of spring term, 1846, as *inoperative* as to the change of venue, and orders a change of venue *de novo* upon a *new* application therefor by plaintiff. If inoperative as to *the change of venue*, it could only be so by the default of plaintiff or her refusal to accept and comply with *the condition pre-*

cedent, and this would render that order of spring term, 1846, void and inoperative *in toto*—as to new trial as well as change of venue.

7. The venue in such an action as this, is *local*. And the Circuit Court of *St. Clair* county could not have or exercise jurisdiction except by a regular and valid order for the change of venue. Clay's Dig. 342, § 162; ib. 343, § 167; Boynton v. Foster, 7 Metc. Rep. 415. Whenever the action of a court is *void*, no exception need be taken. 16 Ala. Rep. 730; 13 Ala. Rep. 529.

8. In this and all other cases in which the Government acts through the medium of agents, the power exists and may be rightfully exercised, to examine and ascertain, if the prerequisites of the law have been complied with. Rosser v. Bradford, 9 Porter 358.

9. Inasmuch as this suit was commenced long after five years had elapsed from the date of the treaty of March, 1832, and by an Indian to whom no patent has ever issued, such Indian cannot lawfully recover without proving both the following propositions, to-wit: I. That such Indian "at the end of five years" from the treaty was "entitled" to the selection; and II. That "*at the end of the five years*," such Indian was "*desirous*" of "*remaining*" in the country. 15 Ala. Rep. 531; 13 Ala. Rep. 801. See Edwards v. Lewis, 18 Ala. Rep. 495, as to estates to arise on a condition precedent. And even if *she* desired to *remain* in the country, still if her *children and grand children* had no such desire, but voluntarily removed from it and never have returned, *they* cannot recover. The condition of *remaining* in the country applies to *them* as well as to *her*. 13 Ala. Rep. 800.

10. The desire to recover the land, is different from the *desire to remain in the country*. The bringing of a suit more than six years after the treaty, is by no means conclusive proof of a desire to *remain in the country;* especially when the proof also shows that the suit was probably brought after the death of the plaintiff, and has been vigorously prosecuted for at least ten years after her death in her name, through all the courts and the venue changed, before any offer to revive, and when it is shown also that within the five years after the treaty she sold the land to Gooden & Green, and that *since*

her death she has given security for costs in two Circuit Courts (Benton and St. Clair). If she had *desired to remain in the country*, that desire could have been made known or manifested very satisfactorily between the lapse of the five years from the treaty and her removal to the west—a period of more than *one year and five months*. It was essential to her right that she should have made it manifest *within the period elapsing* between the expiration of the first five years of the treaty and her removal to the west (or the beginning of this suit). She had *no right to sue after the lapse of the first five years* from the treaty, *until* she did manifest such desire. Yet there is not a particle of evidence of such manifestation of desire, after the lapse of five years from the treaty! And it was after the lapse of these five years, that Congress passed an act, which in part or in whole constituted the authority under which the defendants afterwards purchased and procured patents. The argument for defendant in error *assumes* that because Sally Ladiga was not in actual possession of the land, it was impossible for her, during seventeen months, to make known in any way her desire to *remain in the country!!!*

11. The fact that she sold the land to Gooden & Green, as offered in evidence, was admissible (although the sale might have been void) for the purpose of showing that she had no *motive* to remain in the country—no intention to remain—and also for the purpose of affecting *the credit* of Gooden (a witness for her). Cromelin v. Minter, 9 Ala. Rep. 601; Johnson v. The State, 17 Ala. Rep. 618.

12. The charge of the court is erroneous, because it withdrew from the consideration of the jury the following important questions of fact, as to which there was a conflict of evidence and the burden of proof on the plaintiffs, to-wit: I. Whether or not "*at the end* of five years" from the treaty, Sally Ladiga made known her desire to remain in the country; II. Whether or not Sally Ladiga was not dead at the commencement of this suit; III. Whether or not the present plaintiffs were *the heirs* of Sally Ladiga. Hall v. Heirs of Wilson, 14 Ala. Rep. 295. IV. Whether since her death her heirs *have manifested* a desire to remain in the country. Wells v. Thompson, Ala. Rep. 800. (The heirs were not *forced* out of the country.) V. Whether Sally (although "entitled"

during the five years) was entitled "*at the end of five years*" from the treaty.

The charge of the court is also erroneous in holding the Government and the defendants *estopped* by the refusal of the locating agents to locate and the rejection of her claim "*when she applied for the location*," (that is, in 1832, 1833 or 1834, and *within the first five years* after the treaty), from proving that Sally "at the end of the five years" did abandon the land or was not desirous of remaining in the country!!! This was no *estoppel*, Inge v. Murphy, 10 Ala. Rep. 885, and it is very clear that if the question had been left to the jury untrammelled by the *supposed estoppel*, they would have found that she did abandon the land or that "at the end of five years" she was not desirous of remaining; for the proof is distinct that she left the land without any Government force or interference, voluntarily, "*in* 1834, and *went* to Ball Play creek and *never returned* upon said *land*;" that she had previously sold the land to Gooden & Green and given her *bond for title;* that she remained in the country until "the fall of 1838," (a period of some *four years* after she had voluntarily left the land,) when she with the remainder of the Indian tribe removed west. She had abandoned the land and lost all right or title or just claim to it *long before her removal to the west with the Indian tribe*—by her conduct and omission to make known her desire of remaining in the country "*at the end of five years*" from the treaty or within a short time thereafter—when she was free from force of every description and had full opportunity to make known such desire. The error of a charge withholding any material question of fact from the consideration of the jury, is not cured, although the record contains evidence which seems to make out the fact so withheld from the consideration of the jury. The reason is, that neither the Circuit nor Supreme Court can *weigh evidence* in such case. Gilliam v. Moore, 10 Smedes and Marsh, 138.

13. The phrase "*head* of a *family*" necessarily implies at least *two persons*, between whom there is *dependancy*. Allen v. Mannassee, 4 Ala. Rep. 554.

Of course, where there are only *two persons* in the family and one of them dies the family relation is dissolved, and there is then no "*head* of a family"—"no head"—no "family."

14. Where illegal or irrelevant evidence on any point is admitted, the error of such admission is not cured, although the legal evidence on the same point seems to have been sufficient to prove the point; because the appellate court cannot tell whether the jury based their finding on the legal or illegal evidence or on both together, and also because the appellate court cannot weigh evidence. Whitman v. Bank, 8 Poter, 258; 10 Smedes and Marsh, 130–38 *supra.*

15. It is the duty of the Circuit Court always to protect the jury from the admission of *irrelevant* or any other *incompetent testimony.* Mardis v. Shackelford, 4 Ala. Rep. 501.

This duty cannot be evaded by the court or transferred to the jury, by leaving it to them to say *what weight* they will give to the irrelevant or incompetent proof. The court must primarily decide upon its "ADMISSIBILITY;" and whenever *irrelevant or any other kind* of *incompetent* evidence is admitted, it is a *fatal error*, wherever "the illegal is not withdrawn, or the jury are not explicitly instructed to *disregard it*," (*not to weigh it at all.*) DeGraffenreid v. Thomas, Ala. Rep. 681.

"Illegal or improper evidence ought never to be confided to the jury, however unimportant it may be to the cause." Brown et al. v. May, 1 Munford, 288.

16. Although Sally Ladiga might have been "entitled" to the land, yet the *present plaintiffs* below cannot recover without *proving* to the jury that they had *the legal title* and that they were the heirs of Sally Ladiga. The general issue put in issue the *legal title* and the fact whether the present plaintiffs below were the heirs of Sally Ladiga. Hall v. Heirs of Wilson, 14 Ala. Rep. 295.

17. It was error to admit "the common reputation amongst the Indians of the Creek tribe" to prove that the plaintiffs "were the children and grand children of Sally Ladiga." White v. Strother, 11 Ala. Rep. 720; Blann v. Beall, 5 Ala. Rep. 357.

18. The evidence is clear beyond dispute, that the *present plaintiffs below* cannot recover, even if it were conceded that *Sally Ladiga could have recovered. They* removed *voluntarily* from this country, and although Sally Ladiga has been dead some *thirteen years*, they have *never returned* or indicated any

intention to return. They cannot have the land, after this voluntary removal and voluntary remaining out of the country, and without any intention of remaining in this country. 13 Ala. Rep. 800; 9 Ala. Rep. 601; Edwards v. Lewis, 18 Ala. Rep. 495, and authorities cited there as to estates to arise on condition precedent; Pope et al. v. Hamner, 5 Ala R. 433.

The first affirmative charge given, is wholly irreconcileable with this view; because it asserts distinctly that the present plaintiffs were entitled *to recover* if the jury found that "*Sally Ladiga* was entitled to the land as a reservation under the Creek treaty of 1832." This charge relieved the plaintiffs from the proof that Sally Ladiga was "entitled" "*at the end of five years,*" and from the proof of other *essential matters*, and is *affirmative*, and must work a reversal.

WHITE & PARSONS, and JOHN T. MORGAN, for defendants.

1. The Act of January 16th, 1832, Aiken's Digest, 1st edition, page 225, § 18, extended to the Creek tribe of Indians all the statute laws of Alabama, with certain exceptions, and, as a necessary concomitant, the rules of the common law, as applicable to our institutions and the genius of our government, were also extended to said tribe. This was before the treaty of March 24th, 1832, which, when adopted and certified, became the supreme law of the land. Wall v. Williams, 11 Ala. Rep. 826.

2. There is nothing in the treaty which in any manner alters the laws of descent, made applicable to the Indians by the Act of 26th January, 1832; and any estate, real or personal, which the heirs at law of a Creek Indian would have been entitled to before the treaty, they would be at least equally entitled to after the treaty.

3. Before the treaty, according to the case of Chinnubbee v. Nicks, (3 Porter, 362,) the right of occupancy, to no part of the territory, could be sold by any individual of the Creek tribe of Indians. It is not necessary to a correct decision of this case, to dispute the *dictum* mentioned, but the observation of the court in that case was evidently made without at all considering the 14th section of the Act of 1836. Aikens' Digest, 225, § 25.

The decision was evidently based upon the authority of

United States v. Clarke, 9 Peters, 168, and other cases there referred to, but those decisions did not touch upon the question, whether the general principle stated should not be controlled by legislation in the States where those tribes were situated. In Worcester v. The State of Georgia, 6 Peters, 580, the right of the States to legislate for tribes of Indians who had lost the power of self-government, and were surrounded by whites, was clearly admitted, but that case turned upon the treaty stipulations between the Cherokees and the United States. The legislature of the State of Alabama, *before the treaty* of 1833, at Washington, for the Creek tribe of Indians, must be presumed to have rested upon the ground stated in the case in 6 Peters, 580. The argument is conclusive, when the terms of the after made treaty are looked to. The treaty does not secure to the Indians any law-making powers in said territory, but excludes the idea, by a direct guarantee of the exclusive right to legislate for themselves, west of the Mississippi. The nationality of the tribe was destroyed, until they should emigrate west of the Mississippi. The twelfth article of the treaty regards the Indians then in this territory as a part only of the nation. The twelfth article provides a fund to defray the expenses of such Indians as before that time had emigrated.

4. These citations are conclusive to show the power of the State Legislature before the treaty to extend its jurisdiction over the Creek territory and the Creek tribe.

The reservation of ninety sections to the principal chiefs, was evidently intended to embrace also a reservation made to *friendly chiefs*, in the first article of the Treaty of Capitulation, made August 9, 1814. U. S. Statutes, 7, page, 120. That article granted the lands to the chiefs *and their descendants*, and no provision has been made by subsequent treaty, or by Congress, to give patents to the friendly chiefs provided for in the treaty at Fort Jackson. The provisions of that treaty were carried out in the treaty of Washington, and not abridged in any manner.

5. The subsequent legislation of Congress, on the treaty of 1832, (Statutes at Large, vol. 5, 186,) shows that Congress respects the rights of inheritance of the descendants of Creek Indians, and confirms sales made by them of lands belonging to the deceased reservee.

The whole power of legislation in relation to said lands is in the hands of Congress, subject to the restrictions of the treaty and the rights vested under the treaty; and the laws passed by Congress are not merely legislative construction, but stand in the light of an admission on the part of the government, that the descendants of Indians are entitled to the land.

6. The decisions of our court upon the treaty of 1832, necessarily settle the law in relation to the hereditable quality of the estate in the hands of the reservee. In Chinnubbee v. Nicks, 3 Porter, 366, the court define the title to be a *defeasible fee*, a *qualified fee*, and the decision is distinctly rested on the ground that Chinnubbee had made an appointment, and *thereby* defeated his wife's right of dower, which otherwise would have been perfect at his death. In that case the court say that the President's approval *was no part of the contract* of sale, and that it was merely an opinion of the President that the contract was good. Still, it was no contract without approval by the President. *Chinnubbee died before the approval.* If the land, on the death of Chinnubbee, *escheated or reverted to the government*, the President's approval would have been more than a *mere opinion;* it would have been the only act, in relation to the sale, which could have been of any validity.

The opinion in Chinnubbee v. Nicks is approved in Ladiga v. Rowland, 2 How. U. S. Rep.

In Fipps v. McGehee, 5 Port. 432, the title is called an "inchoate *legal* title—the right of entry upon the land, and the right to resort to courts to assert the right. In Jones and Parsons' heirs v. Inge and Murdis heirs, 5 Porter, 332, the court say, the right of the reservee was a *legal estate vested in the Indian, and could be by him enforced in a court of law.*" In this case, page 334. the case of Chinnubbe v. Nicks is approved and its meaning defined. The court did not decide that the reservee had no *legal title.*

7. In Wells v. Thompson, 13 Ala. Rep. 530, the court recognize the rights of the heirs of the Indians to the land of deceased reservee, and classify the title as a "*defeasible fee*," defeasible "*on the not happening of a certain event*," to wit, the *manifestation of a desire* on the part of the reservee or his

heirs, to remain upon the land, within the five years. Ladiga manifested her desire, by suing for the land; and her heirs, by continuing the suit after five years elapsed. The government, by its patent, put the plaintiffs in error in possession of the land, and prevented Ladiga or her heirs from acquiring the title. Can the government be heard, to say, "you have not manifested a desire to stay on the land," after making such manifestation simply a vain act! But Wells v. Thompson is not in point. That was a suit brought *after five years had elapsed*, by persons who had done nothing to signify a desire to occupy the land, and were not in the country when the treaty was made. That case *turned upon the curtesy of the husband.* How could he have curtesy in lands to which his wife only had a life estate? 2 Black. Com. 98, (125).

8. The idea, so frequently advanced, that on the abandonment, by the reservee, or on his omission to signify his intention to take a patent for the lands assigned to him, *the land reverts* to the government, cannot be extended to the heirs of the reservee, where the reservee did no act to work a forfeiture in his life-time. There is no true idea of a reversion in the treaty, or arising ,from it; the idea upon which government succeeds to the entire estate is *by forfeiture, not by reversion.* It is a paradox, to say that the owner of the fee becomes a reversioner, when he grants no estate out of himself, but only agrees to grant an estate, upon conditions. There is *no provision in the treaty* for either a reversion or a forfeiture; it is all a matter of construction. At common law, every intendment is made in favor of the heir at law, and he is not to be disinherited, except by a plain intention. 1st Durnford & East, 109; 1 Black. Com. 371, and note 6.

9. The estate of the Indian reservee is very nearly assimilated to an estate upon special trust, to be conveyed to the *cestui que trust* or his assignee upon conditions annexed to the estate, and the title of the government resembles very closely the ultimate fee which enured to the Crown, under the Feudal System. The law is well settled, that estates do not escheat or revert (synonymous terms) to the Crown, where there are heirs at law, or even, in a trust estate, where there are no heirs at law, but a trustee. Greenleaf's Cruise, vol. 3, p. 194, tit. xx, Escheat, § 2, *et seq.*, to page 208–9.

10. By the treaty, it was the design of both contracting powers, to secure *to every class of Indians*, the benefits of the same; head chiefs, orphans, heads of families, and those who had emigrated. If the land was forfeited by the death of the head of the family, the family would be unprovided for. Congress, in construing the treaty, asserts the rights of the widow and children of the reservee to dispose of the land.

11. If a woman had lost her husband and children, before the treaty, she would be unprovided for, unless she were the head of a family; but she would be a head of a family, under the terms of the second article of the treaty, which makes the reservation *for the use of the reservee*, not of the family. The term "head of a Creek family," is a *descriptio personæ*, and is not to be construed according to the rules of construction applicable to our statutes of exception from execution. Those statutes are intended to secure property *for the use of the family*, and the term family is not a *descriptio personæ*, but a term denoting a class of persons. Suppose a Creek man with children married a Creek woman with children by another husband, and they were living together at the date of the treaty, would not both of them take reservations? It will not do to say that this was a *casus omissus* in making the contract; such would not be a fair interpretation of it. By the treaties, from first to last, the Creeks put themselves under the *guardianship* of the government; and the President is called their *great father*. Shall the guardian, by a narrow construction, rob his ward of a whole territory, and then of the promised consideration upon which the cession was made? See Statutes at Large, vol. 7, p. 35; Cherokee Nation v. Georgia, 5 Peters, 1.

12. If these positions be true, there was no error in admitting evidence of Ladiga's acts and declarations about her grand-child, for which the court would reverse, for there was no injury. The proof was clear, independent of that proof, that she was the head of a family.

13. As to the competency of John Gooden, these cases are conclusive. 5 Porter, 503; 5 P. 161; 18 Ala. Rep. 196; 18 Ala. Rep. 118.

14. The demurrers to the pleas were well sustained. The general issue had been pleaded jointly, and the case tried

upon it, and the court should have rejected the pleas; but if not rejected, the pleas were bad. 3 Bibb, 314; 2 Stew. 356; 3 Rand.; 12 Serg. & Rawle, 435; 3 Bibb, 180; 8 Watts, 356; 9 Dana, 452; 3 B. Munroe, 176; 21 Wend. 598.

15. The proof of Sally's declarations made to Goodwin were competent as a part of the *res gestæ*, or control of the boy. See Phillips' Ev. Cow. & H., notes.

16. The new trial, at Spring Term, 1846, was granted on payment of all costs by plaintiff, "on or before the 1st day of August following." This would seem to bring the order within the rule which is hinted at by this court in Edwards v. Lewis, 18 Ala. Rep.; but at the same time, and in the same entry, follows an order for a change of venue In relation to *this* the entry says, "if the cost is not paid by the first of August, *a change of venue is denied.*" Is it not, therefore, apparent, the court did not intend to make the new trial depend on the payment of costs as a condition precedent?

17. But it is said *Sally was dead* at the time this order was obtained. The record does not show this fact. We find, "that in the fall of 1838, she started with the emigrating company of Indians, and never reached the west bank of the Mississippi river." If inferences are to be drawn, they will be in favor of the record, and not against it. Indeed, every *intendment* is in favor of record, which is not expressly negatived by the facts set forth in the record.

Again, it said "a party complaining of error must set out in the record so much of the evidence as is necessary to show it *affirmatively.*" Brazier & Co. v. Burt, 18 Ala. Rep. 201.

No exception was taken in the Circuit Court of Benton County, to the action of that court in changing the venue; but we find the defendants objecting in the Circuit Court of St. Clair to the record or transcript and papers being filed in that court. This objection not only came too late, but was made in the wrong forum.

18. The cause was revived in the name of the heirs of Sally. The Court determined who were the heirs, and no exception was taken to this mode of trial; therefore this court will not review that question. Doe ex dem. Ethridge v. Malempre, 18 Ala. Rep. 571.

19. The judgment entry of Spring Term, 1849, shows that

defendants went to trial on a joint plea of "not guilty," and also several pleas of "not guilty." They also plead specially, as appears by the return to the certiorari.

The verdict finds each defendant in possession of a separate portion of the land, viz., Rowland of the north-east quarter, and Heifner of the south-east quarter, and separate writs of possession are adjudged as to each. We insist that this is in strict accordance with the well settled practice—these parties being trespassers on the lands of the plaintiffs; and this has been the practice in actions of ejectment for a hundred years. Jackson ex dem. Haynes v. Wood, and cases cited, 5 John. 278; Roman v. Sidney, 12 ib. 185; Smith v. Shackelford, 9 Dana, 452. In Camden v. Haskell, 3 Randolph, 466, the court say "the proposition insisted on is negatived by the *uniform practice and all the authorities*," and refer to Buller's Nisi Prius, 98, and Adams on Ejectment; 21 Wend. 598; 12 Serg. & Rawle, 435.

DARGAN, C. J.—We will not examine in detail every question that has been presented in the course of the argument, but only such as are material to the merits of the cause, as it is presented to us by the record.

When this case was before the Supreme Court of the United States, the facts material to the right or title of Sally Ladiga were in substance the same, as they now appear from the record before us; and that court held, that a grandmother of the Creek tribe of Indians, with whom her grandchildren resided, was the head of a family, within the meaning of the second article of the treaty concluded on the 24th day of March, 1832, between the United States and the Creek tribe East of the Mississippi River.

It was also held, that, as Sally Ladiga resided on the half section of land in controversy, and selected it as her reservation, and made application to the agent of the Government to be located upon it, the refusal of the locating agent to recognize her right upon the ground that she was not the head of a family, did not in any manner affect her title derived under the treaty. It was also held, that, as she had made application to be located on the land, and her application being refused and she afterwards being removed from the country

by the military force of the government, she had not abandoned the land, nor lost her title thereto derived from the treaty, and consequently that her title was superior to the title of the defendants, which is derived under the same article of the treaty which authorizes the President to select twenty sections of land for the benefit of the orphan children of the Creek tribe, to be divided amongst them or to be sold for their benefit as the President might direct. See 2 Howard R. 581. This decision, the effect of which we have stated, is conclusive to show that the title of Sally Ladiga, so long at least as she was in life, must prevail over the title of the defendants; and we yield to it, not only as authority binding upon us, but as a correct exposition of the treaty.

But as she has departed this life since the institution of this suit, the question arises, whether she had such an estate as would descend to her heirs at law, who had removed west of the Mississippi with their tribe.

Before the treaty the ultimate fee simple to the land was vested in the General Government. This at least was the policy adopted by our Government in reference to the Indian lands. The Indians were allowed the right of possession, but not the right of disposition—that right, or the ultimate fee, was claimed by the Government of the United States. The Indians however had an interest in the soil, and that interest was the right to occupy and enjoy, and the Government of the United States has never assumed to deprive them of that right, except by contract founded on sufficient consideration. And in the treaty of the 24th March, 1832, it was part of the consideration, moving from the General Government to the Creek tribe, *that each head of a Creek family should be entitled* to a half section of land, to be selected by him or her so as to include his or her improvement, if the selection could be so made. The second article of the treaty, which conferred this right on the heads of families, also provides, that the tracts thus selected should be *reserved from sale for their use for the term of five years*, unless sooner disposed of by those entitled to them. The third article stipulates, that these tracts of land, thus selected by the heads of families, may be conveyed by the persons selecting the same for a fair consideration, in such manner as the President may direct, but that the

contract should not be valid until it had received the sanction of the President. The fourth article provides, that at the end of five years all the Creeks entitled to these selections and desirous of remaining shall receive patents therefor, in fee simple, from the United States.

If we were to admit that, under these articles, an Indian reservee would forfeit his title to the land allotted to him, by abandoning the possession and removing from the country within the five years, as was indicated in the case of Wells v. Thompson, 13 Ala. 793; still, I think it clear, that if the Indian reservee took possession of the land allotted to him, and neither sold it, according to the provisions of the third article of the treaty, nor abandoned it by leaving the country within that time, then he became entitled to a patent, and was vested with the fee simple title.

The fourth article of the treaty, it is true, provides, that at the end of five years, all the Creeks entitled to these selections and desirous of remaining, shall receive patents therefor in fee simple. But there is no provision made in the treaty prescribing the mode in which the desire of the Indian reservee shall be made known to the Government, nor is any time prescribed after the expiration of the five years, within which he should make his wish or desire known, but he becomes entitled to a patent at the expiration of five years, if he is desirous of remaining in the country. This desire, I think, is sufficiently indicated by his failure to sell within five years, and his remaining upon the land allotted him without abandonment. An Indian reservee who had not sold, but had remained upon his reservation, would have performed the condition upon which he was to receive a fee simple title to the land allotted to him, and he would hold it to himself and to his heirs forever, as any other tenant in fee; and consequently upon his death the land would descend to his heirs at law, who could even before the issuance of the patent bring ejectment. This view may not be entirely consistent with the case of Wells v. Thompson, *supra*, or rather with the reasoning employed in that case, but I hold it to be in accordance with the plain meaning of the treaty; for at the very moment of the expiration of the five years, the Indian became entitled to a patent in fee simple, for then the condition sub-

sequent annexed to the grant was performed, provided he had neither sold nor abandoned the land. The head of a Creek family, therefore, took a title under the treaty defeasible upon the condition that he either sold or abandoned the land within five years. If he had done neither within that period, that is, if he neither sold it according to the provisions of the third article, nor abandoned the land, his title then became absolute and indefeasible, and of course descended to his heirs.

We have seen from the decision of the Supreme Court of the United States, made in this case, that Sally Ladiga became entitled to the land in controversy, by virtue of the treaty, as the head of a family, and it is certain that she has not sold her right according to the provisions of the third article of the treaty. Nor did she abandon the land; on the contrary, she repeated her application before several locating agents, all of whom rejected it, and although she removed from it in consequence of some difficulty between her and one Smith, who it seems surrounded her cabin by a field opened by him, yet she was found in a shelter upon or near the land, by a soldier of the United States, and was carried by him to a company then about to emigrate west. She was neither asked nor consulted whether she wished to abandon the land or not, but, so far as we can discover, was removed without any regard to her wishes, and this too, after the expiration of the five years. In no just sense can it be said that she abandoned it, which implies a voluntary act. She removed from the land in consequence of the unlawful act of an intruder, and was then removed from the country by the Government, without any inquiry whether she desired to remain on the land or not. To hold this to be a voluntary abandonment of the land, within the meaning of that term which would work a forfeiture of her title, would, in my judgment, be a stain upon our Government. It would in effect be, to allow lawless force to defeat individual rights. But it would have sufficed to have said, that the Supreme Court of the United States have decided that she had not abandoned the land, and consequently was still invested with the title, notwithstanding her removal from the country, and therefore her title of necessity must have descended to her heirs; for not having sold the land, and not having abandoned it within five years, her estate became absolute

and indefeasible, and her heirs at law may maintain ejectment upon her title.

It is however urged, that the court erred in the admission of evidence introduced by the plaintiffs to show that Sally Ladiga was the head of a family. Goodwyn, a witness introduced by the plaintiffs, testified that in March, 1832, he sold to Sally Ladiga some clothes for the boy Archechee, and she then told him that it was the same boy he had seen with her in 1831. To the admission of this testimony the defendants excepted.

It must be borne in mind that the objection is to the whole of the testimony, and not to any specific part of it; consequently, if any portion of it was admissible, there was no error in admitting it, for the court is not bound to separate the evidence when the objection is to the whole, and if any part of it be admissible there is no error in refusing to reject it. And I think that, even if what Sally Ladiga said at the time of purchasing the clothes, that Archechee was the same boy that the witness saw with her the year before, was inadmissible, still, it is very certain that the witness might well have testified to the act of selling her clothes for Archechee, for it tended to prove that he was one for whom Sally Ladiga was bound to provide as a member of her family.

It is again insisted, that the court erred in admitting the common rumor amongst the tribe of the Creek Indians, that the plaintiffs were the children and grandchildren of Sally Ladiga. But as this question was raised it cannot be reviewed by this court; for it does not appear from the bill of exceptions that this proof was offered to the jury, but to the court, upon the motion to revive the suit in the name of the plaintiffs as the heirs at law of Sally Ladiga. By our statutes, a party from whom lands are unlawfully withheld, may bring ejectment or trespass to try titles for the recovery thereof at his election. Clay's Digest 320; Jordan v. Abercrombie, 15 Ala. 580. And if the action of trespass to try titles be brought to recover the free-hold, and the plaintiff die pending the suit, the action does not abate, but may be revived in the name of his heirs at law. Jordan v. Abercrombie, *supra;* The State ex rel. Nabors' Heirs, 7 Ala. 459.

Inasmuch as the action may be revived in the name of the heirs, the court may, without violating the law, require some proof of their heirship; but we could not say that it would be error to revive the suit on motion merely, without any proof whatever of the heirship of the plaintiff, for notwithstanding the court might allow the suit to be revived in the names of the plaintiffs, as the heirs at law of the deceased plaintiff, still, upon the trial before the jury, they would have to prove their heirship as part of their title, and if they failed in this they would fail in the suit, although the suit was revived in their names. The proof, therefore, to which the defendants excepted, being introduced to the court as laying a predicate for reviving the suit, is not revisable; and it is therefore immaterial to inquire whether it would have been legitimate evidence to prove the heirship of the plaintiffs before the jury or not; for if the order of revivor had been made without any proof at all, it could not have been an error of which the defendants could have complained; they might still have contested the heirship of the plaintiffs upon the trial.

We however deem it proper to say, that in questions of pedigree the declarations of deceased members of a family have always been received as evidence, to establish the parentage or descent of the particular individual whose relationship is the subject of investigation. Green. Ev. Vol. 1, § 103, and cases there cited; Starkie on Evidence, Vol. 2, 834.

This brings us to the last question we propose to examine, and that is, the first charge contained in the bill of exceptions. The language of that charge is: "that if each of the defendants was in possession of a different quarter section of the half section of land in controversy, and each claimed title to the quarter section in his possession, and there was no connection between the title and possession of the defendants, and if they found that Sally Ladiga was entitled to the land as a reservation to her under the treaty of 1832, they must return a verdict for the possession of each quarter section separately against each defendant." This charge is assailed on two grounds: first, because a joint action cannot be maintained against two defendants, who occupy distinct parts of the land sued for, and between whom there is no connection; and secondly, because this charge assumed that the plaintiffs

were entitled to recover, irrespective of the fact, whether or not they were the heirs at law of Sally Ladiga.

In respect to the first objection, it is sufficient to say, that if land be withheld from one unlawfully by several tenants, they may be all sued in one action, and if they possess distinct parts separately, and not in connection with each other, they may protect themselves against a joint judgment for damages; but the rule is well settled, that the plaintiff is not compelled to sue all separately, for the recovery of the possession, but may sue them jointly and recover of each the portion occupied by him. Jackson *ex dem.* Haynes, *et al.* v. Wood and others, 5 John. 278; Camden et al. v. Haskell, 3 Rand. 462; Adams on Eject. 235.

The second objection to the charge, however, we think is well taken; for if the right of a plaintiff to recover depends on three or more distinct facts, a charge that assumes he may recover if two only be established, must be erroneous. In the case before us, it may be that Sally Ladiga was entitled to the land in controversy as a reservation, and the defendants may have separately occupied distinct portions of it, and still, the plaintiffs could not recover without showing that they were the heirs at law of Sally Ladiga; but this charge, *standing alone*, rendered it unnecessary for the jury to inquire into the question of heirship, and placed the right of the plaintiffs to recover on the two questions, the title of Sally Ladiga, and the possession of the defendants.

It is however urged, that we should presume that in the other instructions given by the court to the jury, and which do not appear in the bill of exceptions, the jury were informed by the court that they must find that the plaintiffs were the heirs at law of Sally Ladiga; especially, as the record informs us that the court, in response to the defendants' inquiry upon the motion to revive the suit, informed them, that they might contest the plaintiffs' heirship upon the trial before the jury.

We are satisfied, that the court as well as the counsel engaged in the cause, knew that it was indispensably necessary to the plaintiffs' right of recovery, to establish their heirship, and it may be, that the jury were in fact so instructed, but the record does not show that they were; it shows that they were charged, that the plaintiffs were entitled to recover, if

Sally Ladiga was entitled to the land as her reservation under the treaty, and if the defendants were in possession of separate parts of it. This charge, standing alone, and unexplained by other instructions, is erroneous, and the record does not show what explanation or other instructions tending to explain it were given. We therefore cannot say the charge is not erroneous within itself, and without further instructions it is erroneous; and in order to take away the error, we must see the further instructions that were given, and which had this effect.

For this error, we are constrained to reverse the judgment, and remand the cause for another trial.

PHELAN, J.—The action was commenced below in the name of Sally Ladiga; she died, and the suit was revived in the name of her heirs at law.

In respect to the charge for which the judgment below is reversed, it is said: here is an affirmative charge which embraces but two points of law, when three were necessary to be stated, to inform the jury fully of the duty which devolved on the plaintiffs to make good their action. The court below charges the law respecting the *title* of Ladiga and the possession by the defendants, but omits to notice the *heirship* of the plaintiffs. The alleged error, then, is not in misdirecting the jury on the points of law which were noticed, but in omitting to notice another point altogether.

Now I will ask, does it, in the first place, clearly appear from the record, that this point was omitted altogether by the judge below? And, if omitted, does it, in the second place, further clearly appear from the record, that such omission was to the injury of the plaintiffs in error?

I do not think it clear, from the record, that the point as to the *heirship* of the plaintiffs was wholly omitted in the charge to the jury. The bill of exceptions itself discloses that "*other* charges" were given, besides those set down in the bill. The nature of the trial, and the purely formal nature of the point as to *heirship*, (about the law of which there could hardly be a dispute) lead to the fair presumption, as it seems to me, that one of these "*other*" charges to which the bill of exceptions refers, was a charge respecting the *heirship*

of the plaintiffs, and that the reason why it is not set out, or more specifically noticed in the bill, is, that there was no exception taken to it.

In Donnell v. Jones, 17 Ala. Rep. 689, the court say, "When we are called upon to construe a doubtful bill of exceptions, that construction will be adopted which is most favorable to the regularity of the judgment." Indeed, it is a general principle, well established, and, I may say, a favorite one with appellate courts, to indulge all reasonable presumptions and intendments in favor of the regularity of the action of the court below. 14 Ala. Rep. 822; 6 Ala. Rep. 801; 7 Ala. Rep. 19; 3 S. & P. 444.

But even admitting that, with the aid of this favorable rule of construction, we cannot presume that any charge on the point of *heirship* was given, the next question recurs; does it clearly appear from the record, that the omission to charge on that point was to the injury of the plaintiffs in error?

Let it be borne in mind, that the charge does not state any rule of law erroneously; its error is alleged to consist, in omitting to state a certain point altogether. The rule fairly deducible from such a doctrine, I hold to be this: that it is necessary for a judge of the Circuit Court, when he makes an affirmative charge, to state the law which relates to every material allegation of the plaintiff's declaration, or his charge will be erroneous.

Can such a rule be made to consist with the doctrine that the party seeking to reverse must clearly show error, and that all reasonable intendments and presumptions shall be in favor of the regularity of judgments. I do not think it can, as I will endeavor to show.

We know that in almost every proceeding in the inferior courts, there are certain formal matters of fact, which must be proved to entitle the plaintiff to recover, which rarely ever become the subject of controversy. Again: we know that nothing is more common in practice than for a defendant, either to save costs, or for some other good reason, to abandon altogether some legal point in the defence, although such abandonment never appears upon the record.

Now it is undeniable, that in cases where there are such uncontroverted matters of fact or conceded points of law,

charges are continually given by the circuit judges, which, under this rule, would reverse judgments, without the slightest injury having been done to the defendants by the omission to notice them in the charge.

To illustrate my meaning: A plaintiff sues as administrator, and the defendant by plea puts the character in which he sues in issue. At the trial the plaintiff brings his letters into court, proving conclusively his character, and there is not a word of controversy more on that subject from beginning to end, but the case is strongly litigated, on the plea of *non est factum*, for instance. The court charges the jury, and says: "Gentlemen, if you find that the defendant executed this bond, you must find for the plaintiff." The attorney for the defendant says, "I except to that charge," and takes his seat, without saying more. The judge, and probably every body else but himself, has forgotten that he had a plea in that plaintiff was not administrator; the proof upon that point was conclusive; he has made no allusion to that defence in his argument; and if the judge's mind reverts to it at all, he regards it as tacitly abandoned. Does the counsel want a charge upon that point? Not at all; that is the very thing he does not want. To disclose what he wants would defeat his object, which is, to keep a charge that does him no harm in its present frame, that he may reverse the judgment upon it, when he knows that the least allusion to its supposed defect would result in a prompt correction by the court.

This court would be compelled to reverse for error in the charge in the case I put, on the principle established in this case. I will put another case.

A party is indicted for assault and battery. The State does not prove the venue—a merely formal thing. The court says; "Gentlemen, if you find that the defendant struck the prosecutor without provocation, you must find him guilty." The counsel for the defendant says, "I except to that charge, and I ask the court to charge the jury, that it was necessary for the State to prove that this offence was committed in *this county*." "True," says the judge, "that is necessary, but it is a mere formal and technical thing, and I will allow the solicitor to prove that now." Is any injury done to the defendant by this? None. Such a course is perfectly lawful. Here

the counsel, by disclosing the ground of his objection, enables the court in a moment to obviate it, and not only to supply the charge, but the proof to base it upon. What, then, if the counsel had chosen to except, without disclosing the ground of his objection, shall that better his client's condition? In other words, shall a cautious and artful concealment accomplish ends which openness and fairness cannot?

What I now propose, seems to me to furnish the ground for a sound distinction in cases of this sort.

If an affirmative charge touching the *merits of the action*, strictly so called, is correct, such charge should not be held to be erroneous because it does not likewise embrace formal and technical matters, unless it be excepted to in the court below for that reason.

To recover in any action, a plaintiff must first have a good cause of action, and, secondly, he must pursue it in a formal manner, correct according to the rules of law. If a charge covers the first matter, and is correct, the court may stop at that; and if the defendant wants a charge in respect to formal matters, he must ask it, or he ought not to be allowed to object in an appellate court, that such formal matters were not noticed. The trespass on the lands of Sally Ladiga, the *locus in quo*, was the *gravamen* of the declaration, and the *merits of the action* embraced this and the title of Sally Ladiga only; all other things were formal.

It is not every allegation in a declaration necessary to make it good, even upon general demurrer, that embraces the *merits of the action*. Waldrum and Wife v. Quarles, 20 Ala Rep. If a party goes to trial without demurring, he is held to be precluded from assigning as error in an appellate court, many such omissions in the declaration; but if the court below makes an affirmative charge, and does not cover such matters, although not objected to on that account, it is by this decision held to be error. This does not seem to me to be consistent.

Such a rule as I propose would secure to one party every just right, and at the same time prevent the other party from being lulled into a false security by his silence, when he ought to speak out; it will at the same time prevent the circuit judges from the consequences of a cautious and artful silence on the part of counsel.

I close these observations in the language of C. J. Collier, in the case of Crawford v. The Bank, 7 Ala. Rep., 210." "General objections, calculated to entrap the court and the adverse party, should be discountenanced, and when they are not promotive of justice, should be most unfavorably regarded in an appellate court."

I am dealing with a principle, and what I suppose to be its injurious consequences, but, lest it might be supposed that some parts of this opinion are intended to have a personal bearing on the counsel who conducted this cause for the plaintiffs in error in the court below, I take occasion to say, that I intend nothing of the kind. Their conduct was in all respects wholly unexceptionable. It is the consequences of the rule adopted by the court, that I aim to combat, and that alone. The construction that will be given in this court to a bill of exceptions is oftentimes not fully apprehended, either by the counsel who prepares or the judge who signs it.

CHILTON, J., having been of counsel in this cause before his election to the bench, did not sit.

SMITH *vs.* EWERS.

1. The fourth section of the act of 1820, (Clay's Digest, 550 § 4,) which gives a penalty against any person who shall sell an estray before the expiration of twelve months, applies only to estrays which are taken up and appraised as required by the first section of the act.
2. To entitle the plaintiff in error to a reversal, he must show injury as well as error.

ERROR to the Circuit Court of Mobile.
Tried before the Hon. John Bragg.

J. A. CUTHBERT, for plaintiff in error.
BLOCKER, *contra.*

CHILTON, J.—This was a *qui tam* action by the plaintiff in error against the defendant, to recover one hundred dollars, the penalty given by the fourth section of the act of 1820 (Clay's

Dig. 550 § 4,) for selling a stray horse before the expiration of twelve months.

The whole proof is set out in a bill of exceptions, and is as follows: The plaintiff, having lost his horse from his possession in January, 1849, found him after the expiration of three days in the defendant's stable, and was informed by the overseer of the stable that the horse had come there in the night, and had attempted to enter it, but upon being driven away, went to another entrance, where he was taken up. Plaintiff claimed the horse, but the defendant's overseer required him to pay a bill of $2.25 for the stablage of the horse, that being the usual charge for keeping a horse three days. This sum the plaintiff refused to pay, but offered $1.25, which was rejected by the overseer, who thereupon refused to give up the horse. The plaintiff proved that the defendant had published an advertisement in the Gazette, as follows: "STRAY HORSE—Came to the stable of the subscriber on the night of the 8th inst., a gray horse, (describing him.) The owner is required to come and get him, or he will be sold to pay stable fees. January 19. (Signed,) F. EWERS."

The stable charges amounting to a considerable sum, the defendant served a written notice on the plaintiff, informing him that, unless he came forward and paid the charges for keeping the horse, the animal would be sold to pay them. This notice being unheeded, defendant caused the horse to be sold accordingly in February, 1849; the amount of the sale money being $30.

Upon this proof, the plaintiff asked the court to charge the jury, that he was entitled to recover the amount of the penalty sued for, under the statute forbidding the sale of an estray within twelve months. The court, however, responded to this charge, "that the provisions of the statute were manifestly intended to allow that time to owners of stray property to find and reclaim it;" and charged the jury that "if they believed the owner in this case had found the horse, then the horse, as to him, was no longer an estray: that in such case he could not avail himself of the penalty."

The section on which the action is founded is as follows: "If any person shall take or send away any stray out of this State, on any pretence whatsoever, or shall trade or sell the

same under twelve months, he or she, so offending, shall forfeit and pay one hundred dollars, to be recovered in any court of this State having jurisdiction thereof, one half to the use of the informer, and the other half to the use of the county wherein the offence shall have been committed; and, moreover, shall pay to the owner the amount of the appraisement, and if no owner appear, then to the county, subject to the regulations hereinafter ordered under the sixth section of this act."

It is quite apparent, we think, from the phraseology employed in the foregoing section, that the penalty is only given by it as against one who has taken up an estray under the first section. That section requires that "every person who shall take up an estray, which shall be found on his plantation or land, shall forthwith give information thereof to some justice of the peace for the county, and make oath before such justice that the same was taken up at his or her plantation or place of residence, or his or her land adjoining the same, and that the marks or brands have not been defaced or altered since the taking up; and thereupon the justice shall issue his summons to two disinterested house-holders of the neighborhood, commanding them, after being duly sworn, to appraise the same without partiality, favor or affection, and certify the value under their hands, together with a particular description of the kind, marks, brands, stature, color, and age; which certificate shall be attested by the justice, and transmitted by him to the clerk of the County Court within ten days thereafter, to be by such clerk entered in a book to be kept for that purpose," &c. The record before us does not disclose that any thing required by this section was performed by Ewers. On the contrary, the proof pretty clearly shows that he merely took the horse into his stable, kept it three days, when the owner came and claimed it, but refusing to pay the usual charge for keeping, Ewers retained the horse under a supposed lien for its feed. This being the state of the case, and the horse not having been *strayed* under the statute, the party selling it cannot be made liable to the penalty denounced against one who sells a stray before the expiration of twelve months. How could the owner recover the amount of the appraisement, if no such appraisement had

been made? Yet the fourth section which gives the penalty also confers this right, thus showing that it is alone applicable to cases where the animal has been taken up and appraised as required by the first section.

If it is replied, that the fifth section of the act gives a *qui tam* action to recover a similar penalty against any one who "shall *take up or use a stray, contrary to the act*," it is a sufficient answer to say, that this action is brought to recover for *selling* as provided in the fourth section, and not for failing to "take up or use," as prescribed by the other portions of the act. Whether, under the circumstances in proof, the defendant would be liable to the penalty named in the fifth section for failing to take up the horse as provided by the first, is a question which it is improper now to decide, as it is not involved in the case.

Under the construction which we place upon the statute, it results that the charge asked was properly refused. The charge given, as an abstract proposition of law, we do not think was correct, assuming as a predicate for it that the defendant had regularly strayed the horse as the statute requires. After this is done, the *status* of the property continues, until the owner becomes re-invested with it by filing a certificate sworn to, as provided by the eleventh section of the act, and the payment of the cost and expenses, the mode of ascertaining which, when the parties cannot agree upon the amount, is stated in the third section.

The charge, however, must be construed with reference to the proof. That justified the court in instructing the jury, that the horse could not be considered an estray under the fourth section, and that consequently the defendant was not liable to the penalty sued for. The court arrived at a correct conclusion, when it was asserted that the horse was not, under the proof and with reference to this action, an estray, but assigned a wrong reason for it, namely, that the owner was known; whereas a sufficient ground for the charge is found in the fact, that there was a total failure to show that the requisitions of the statute had been complied with, so as to constitute the horse an estray, as contemplated by the section on which the action is founded. As, however, no possible injury could have resulted to the plaintiff from the charge,

even were we to concede it to be erroneous, we cannot reverse the cause. The rule is well established by numerous decisions, that to entitle a plaintiff to a reversal, he must show injury as well as error.

Let the judgment be affirmed.

BARTOL *vs.* CALVERT, Adm'r.

1. An objection to a claim against an insolvent estate, that it was not filed within six months after the decree of insolvency, may be made at any time before the hearing, or at the hearing.
2. Objections going to the verification of a claim, or to its correctness or validity, must be filed within nine months after the decree of insolvency.
3. Objections to the time of filing a claim are properly triable by the court.
4. The failure to object to evidence, or to move for its exclusion, concedes its admissibility.
5. The term "month," as used in the act of 1843 regulating the proceedings on the settlement of insolvent estates, means a *calendar*, and not a *lunar* month.
6. Where a claim against an insolvent estate is rejected, on the ground that it was not properly verified, or was not filed in time, and in consequence of its rejection a surplus is left in the hands of the administrator, such surplus should be appropriated to the creditor, if his claim is not barred on some other ground, in preference to the distributees.
7. A judgment rejecting a claim against an insolvent estate, under the act of 1843, is a final judgment which will support a writ of error, although no issue is made up under the act.

Error to the Court of Probate of Mobile.

The estate of Charles Hammond, deceased, was declared insolvent on the 20th February, 1846, and a final decree of settlement and distribution was made on the 9th September, 1851. The claim of the plaintiff in error is not mentioned in this decree, but by consent of parties, the decree was suspended, and the plaintiff's claim was set for hearing on the 12th September, 1851, with the understanding, that if the claim was allowed, the decree should be opened, and the claimant be let in to receive his *pro rata* share. On the hearing, a bill of exceptions was sealed, at the instance of the plaintiff in error, from which it appears that the plaintiff at

that time presented his claim against the estate, consisting of a promissory note executed by the intestate, and the transcript of a judgment thereon rendered in the Circuit Court, on the plea of insolvency. The administrator objected to this claim on the following grounds: 1. Because it was not filed within six months; 2. Because it was not filed at all until the day of hearing; 3. Because no affidavit was filed; 4. For insufficiency of affidavits; all of which objections were filed on the day of hearing, September 12, 1851. The claimant then moved the court to strike out the objections, because they came in too late. The transcript of the judgment was not filed until the day of hearing. The said note bore no marks of having been on file at all; but among the list of claims against the estate, kept in a book by the clerk of the court, was the following entry in his hand-writing: "James S. Bartol's claim. By note dated September 5, 1836, payable to the order of Whitaker & Bartol, at six months, $3806 58. Filed August 5, 1846. Affidavit of claimant filed August 17, 1846, by J. Lockwood, attorney and affidavit." The note presented, which corresponded precisely with the note described in this entry, was found in the file of papers in the Circuit Court, and taken from thence on the day of the hearing. The attorneys, who attended to the case in the Circuit Court, were shown to be absent from the State.

This was all the evidence offered, and no objection was made to the admissibility of any portion of it. The claimant also contended that no objections could be made to the transcript of the judgment, going behind the judgment itself, and that it needed no affidavit. The court refused to strike out the objections filed by the administrator, considered them sustained by the evidence, and rejected the claim, to which the claimant excepted.

In the decree which was rendered on the 9th September, 1851, the surplus remaining in the hands of the administrator, after satisfying the claims which were then allowed against the estate, was decreed to the distributee of the intestate. The errors assigned are: 1. The rejection of the plaintiff's claim; 2. Directing the surplus in the hands of the administrator to be paid over to the distributee.

JOHN T. TAYLOR, for plaintiff in error, contended:

1. That the objections to the claim came too late.

2. That the evidence of the filing of the claim was sufficient. The clerk is required to keep a list of all claims against insolvent estates, with *the time of filing* the same; and his entry is sufficient proof of the filing.

3. That if the claim was properly rejected, as in favor of other creditors, it was nevertheless a good subsisting debt against the estate, and was entitled to preference over the distributees of the intestate.

P. PHILLIPS, *contra:*

When a statute uses the word "month," without saying "calendar," it means a lunar month. 15 Johns. 120; 2 Black. Com. 141. This estate was declared insolvent on the 21st February, 1846, and Bartol's claim was filed August 17th, 1846, which was nine days after the expiration of the six months; nor was the evidence sufficient to show that it was filed at that time. There is no law requiring the court to receive as evidence the book kept by the clerk containing the memorandum which was relied on.

There was no sufficient affidavit of the claim; nor was the person, by whom it was taken, authorized to administer an oath. It is well settled, that the courts of one State will not take judicial knowledge of the justices of the peace in another State, and the certificate of the clerk, that he was a justice, gives it no sanction.

GOLDTHWAITE, J.—On the hearing of the claim, which was more than nine months after the estate had been declared insolvent, objections were filed by the administrator, to the effect, that the claim was not filed within six months after the decree of insolvency, and that it was not properly verified. The first question which is presented upon the record, arises upon the action of the court below in allowing these objections to be filed at that time. By the provisions of the ninth section of the act of 1843, Clay's Dig. 194 § 10, every person having any claim against an insolvent estate, is required to file the same in the clerk's office, within six months after the estate is declared insolvent; "and every such claim shall be

verified by the affidavit of the claimant; and the clerk shall give a receipt therefor to the claimant, &c., and if no opposition shall be made to the allowance of such claim in the manner hereinafter provided, within nine months after the time when the estate was declared insolvent, such claim shall be admitted and allowed as a good and valid claim against the estate without further proof." The decisions of this court upon this section of the statute have settled, that if the claim is not filed within six months from the declaration of insolvency, it is barred as against such estate, (Hollinger v. Holley, 8 Ala. 554,) and that the omission to verify the claim by affidavit does not have that effect; that the affidavit need not be filed at all, unless called for by an exception to the claim on that ground, but may be made at any time after objection, and before the hearing. Hollinger v. Holley, *supra;* Shortridge v. Easely, 10 Ala. 520; Brown & Co. v. Easly, ib. 564. We may remark also, that the ninth and tenth sections of the act of 1843 contemplate two classes of exceptions which may be made against insolvent estates: the one going to their standing in court, such as the time of filing, and their verification, and the other to the validity or defence of the claim itself; the latter requiring an issue to be made up and a trial by jury. The object of the ninth section was, to give to the administrator and the creditors three months to examine into the condition, and make objections to the allowance of the claims, for any cause which might exist; and it is obvious that they would be deprived of this right, if objections were required to be made within nine months to a claim filed more than six months after the decree of insolvency. But in relation to exceptions going to the verification of the claim, or the claim itself, there can be no hardship in holding the administrator and the creditors to the letter of the statute; while on the other hand, by the adoption of a different rule injustice might frequently result to a claimant who, reposing upon the terms of the statute, and finding no objections filed within the time prescribed by its provisions, takes it for granted that none will be filed, and under that impression omits either to verify his claim, or to provide the evidence necessary to sustain it. These reasons lead us to the conclusion, that the motion to disallow the exceptions going to the

verification of the claim should have prevailed; but as to the objections going to the time of filing, the court committed no error in allowing them to be made at the hearing.

The record shows that the claim set up against the estate consisted of a promissory note, executed by the intestate, and a judgment rendered thereon, on the plea of insolvency, in the Circuit Court of Mobile county, under the act of 1843. Clay's Dig. 195 § 13. The evidence offered in connection with the claim was the docket of the clerk of the County Court, kept in pursuance of the ninth section of the act last referred to, (Clay's Dig. 194 § 10,) in which the entry of the claim was made, corresponding in all respects with the note offered, the name of the claimant, and the additional entry to the effect that the claim was filed on the 17th August, 1846; and also the transcript of the judgment on the note. The entry was proved to be in the hand-writing of the clerk, and was received without objection. The admissibility of the evidence being conceded by the failure to object to it, or to move for its exclusion, the question is alone as to its sufficiency, and in that aspect we can entertain no doubt that the testimony sufficiently established the filing of the claim, on the day specified in the entry. And as this was a matter proper to be tried by the court, an appellate court may review its judgment.

That the note which constituted the claim at the time it was filed, subsequently passed into a judgment under the twelfth section of the act of 1843, (Clay's Dig. 195 § 13,) can make no difference; the claim exists, although in a different shape, and the utmost effect of the judgment under the section referred to is to ascertain its amount.

It is however insisted on the part of the defendant in error, that the term "months" as used in the ninth section of the statute (Clay's Dig. 194 § 10) prescribing the time for the filing of claims against insolvent estates, must be construed to mean lunar instead of calendar months, and that by giving that construction, the claim is thrown outside of the statute. Upon the English authorities the rule is well settled, that a statutory month is a lunar month, unless otherwise expressed, 2 Black. Com. 141; 1 Wm. Bl. 450; Crooke v. McTorish, 1 Bing 307; but in that country the rule, although well estab-

lished, has called forth an expression of regret from eminent judges, (1 Wm. Black. 450,) and there a different construction prevails in ecclesiastical cases, (Crooke v. McTorish, *supra*,) and in commercial contracts, (3 Br. & B. 250.) In the United States there is some conflict of decision, but the current of authority is to the reverse of the English rule. Hunt v. Holden, 2 Mass. 170; Avery v. Pixley, 4 Mass. 460; Commonwealth v. Chambre, 4 Dall. 143; Kimball v. Lawson, 2 Verm. 138; Strong v. Birchard, 5 Conn. 357; Churchhill v. Merchants' Bk. 19 Pick. 532; Brewer v. Harris, 5 Gratt. 285. The general rule established by the American cases commends itself strongly by its superior convenience, its correspondence with our business transactions, as well as the received understanding in the community of the meaning of the term; and for these reasons we adopt it in preference to the English rule. It results from these views, that the evidence offered was sufficient to show the filing of the claim in question, within the time prescribed by the statute, and as no exceptions could be taken to the claim on any other ground, it follows that the decision of the court in rejecting the claim was erroneous.

As the case must be remanded, and another hearing will be had, it is perhaps necessary that we should express our opinion upon another point presented. After rejecting the claim of the plaintiff in error, and after paying all the allowed claims against the estate, a surplus was left in the hands of the administrator, which was by direction of the court decreed to the general distributee. The writ of error being taken upon the rejection of the claim, and not to the decree rendered upon the final settlement, we could not properly review the action of the court below in this particular, as the record now stands; but as to the naked question of law, there can be no doubt that if a claim is rejected against an insolvent estate, on the ground that it was not filed within the time required, or for not being properly verified, and in consequence of its rejection a surplus is left in the hands of the administrator, such surplus should be appropriated to the creditor in preference to the distributee, if his claim against the estate is not barred on some other ground. The cases of Phelan v. Phelan, 13 Ala. 679, and Middleton v. Maul, 16 Ala. 479, are conclusive upon this point.

A question has also been raised in consultation as to whether the writ of error should not be dismissed, as not falling within the thirteenth section of the act of 1843, (Clay's Dig. 195 § 14.) A majority of the court entertain the opinion that by the decree of insolvency the court acquires jurisdiction of the claim, and that the effect of the statute regulating proceedings in relation to insolvent estates, (Clay's Dig. 194, 195,) is, to convert each contest arising upon a claim, into a distinct and separate proceeding, the administrator or the creditors in his name being the parties on one side, and the claimant on the other; and that a judgment rejecting the claim, even where no issue is directed or made, if it does not come within the meaning of the section of the act of 1843, before referred to, is a final judgment within the meaning of the act of 1821, (Clay's Dig. 297 § 4,) to which a writ of error will lie.

The judgment must be reversed, and the cause remanded.

THOMPSON *vs.* THE STATE.

1. The act of 1836 (Clay's Digest, 509, § 11), authorizes the judge of the County (now Probate) Court, and makes it his duty, to fill any vacancy that may occur in the office of overseer of roads, from whatever cause, after a regular appointment has been made.
2. The true distinction between those irregular appointments to office which are void, and those which are voidable only, seems to be this: where the authority under which the officer assumes to act, shows upon its face that it emanates from a power which had no right to confer it, it is void; but where it is regular on its face, and emanates from a source which has the legal or constitutional right to bestow it, and it requires a resort to facts not disclosed in the commission or order of appointment, to show that the power of appointment has been illegally or irregularly exercised, the appointment is voidable only.
3. When an overseer of a road has been regularly appointed by the Commissioners' Court, and afterwards another overseer is appointed by the Judge of Probate, as in case of a vacancy, and the latter appointment is regular on its face, the person thereby appointed is *de facto* the overseer of the road, and his acts in opening it are valid as to the public and third persons, although the former is the overseer *de jure*.
4. When a person is indicted for obstructing a public road opened by an overseer *de facto*, he cannot defend his own misdemeanor under the overseer's supposed

want of authority, although the obstruction consisted in putting up his own fences, which the overseer had pulled down in opening the road.

5. It is no objection to the regularity of the appointment, that it is tested by the Judge of Probate *as clerk*.

6. When all the evidence given on the trial proceeds from the State, and it is without conflict, and establishes beyond a doubt the guilt of the accused, it is not error for the court to charge the jury, "that if they believed the testimony, they ought to find the defendant guilty."

ERROR to the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

The plaintiff in error was indicted in the court below, for obstructing a public highway. On the trial in the court below, as appears by the bill of exceptions, the State showed an order of the Commissioners' Court of Revenue and Roads of Talladega county, establishing the road mentioned in the indictment, at the regular August term of said court, in the year 1850, and dividing it into precincts, and appointing overseers, who are ordered to open said road according to law. It was further proved, that the road so established, passed through the enclosure of the plaintiff in error, which was on her own land; that her lands were situated in the second precinct of said road, of which precinct William Jones was regularly appointed overseer at the August Term, 1850, of the Commissioners' Court, and he was duly notified of his appointment about the 1st of October, 1850; that he was then, and continued to be up to the trial in the court below, a citizen of Talladega county, residing near said road, and within five miles of the point obstructed; that he had never resigned or offered to resign his appointment as overseer; that he had never been removed from his overseership. It was further shown, that there was no term of the Court of Commissioners of Revenue and Roads held for said county of Talladega in the year 1851, until the first Monday in March of that year; that on the 24th February, 1851, the judge of the Probate Court appointed William F. Roberts overseer of the second precinct of the road aforesaid; that the said judge acted in said appointment without the knowledge of the commissioners of revenue and roads of said county, or any consultation with them; that under this appointment, of which he had been notified, Roberts proceeded to open the road on the line of

the second precinct thereof, and in doing so threw down two fences of the plaintiff in error, which ran across the route of said road on her land; that Jones, the first overseer appointed for this precinct of the road, had never opened it through the lands of the plaintiff in error, and that Roberts had no other authority for acting as an overseer than the order of appointment made by the judge of the Probate Court, which was served on him by the sheriff, and is in these words: "Ordered by the court that William F. Roberts be, and he is hereby appointed overseer of the second precinct, from Jamison's mill, extending to the McIntosh road, on the road leading from Burns' blacksmith shop to Wm. Easeley's old place, it being of the first grade. Witness Alexander J. Cotten, *ex officio* clerk of our said court, at office, this 24th day of February, in the year 1851. A. J. COTTEN, Clerk."

It was also shown that the plaintiff in error objected and protested against opening said road through her enclosure, and the pulling down her fences by the said Roberts at the time he was doing it, and denied his authority to do so; that said Roberts had knowledge of the appointment of Jones as overseer before the 24th of February, 1851; that the alleged obstruction of said road consisted in putting up the fences by the plaintiff in error, which Roberts pulled down in opening the road, and keeping them up more than twenty-four hours, in March, 1851.

This was, in substance, all the proof offered in the case; and upon this evidence the court charged the jury: that if they believed all the evidence, the appointment of Roberts as overseer of said second precinct of said road, by the Probate Judge alone, was not void, but only voidable, and that they ought to find the defendant guilty. To this charge the defendant excepted, and asked the court to charge the jury, that, if they believed all the foregoing evidence, the appointment of said Roberts as overseer of said second precinct by the said Probate Judge was void. The court refused to give this charge, and the defendant excepted. The charge given, and the refusal to charge as asked, are here assigned as error.

RICE & MORGAN, for plaintiff in error:

1. To sustain this indictment, the State is bound to prove

that the road was a "*public road*," and that an impediment of some kind was erected across such public road. A *public road* is one which is not only *authorized*, but *opened*, by a *lawful authority*. The road in this case was only *authorized*, but not *opened* by *lawful authority*.

2. A road does not become a *public road, capable of such obstruction* as to subject the party obstructing *to indictment*, merely by being viewed and marked or laid out by the jury. Although it is viewed and marked or laid out by the jury, still it is not capable of such obstruction as to subject the party to indictment, until it is actually "*opened*" or "*cut out*" by *lawful authority*. Clay's Dig. 507, §§ 4 and 5; Peck v. Clark, 19 Ohio Rep. 367; The State v. Johnson, 11 Iredell's Law Rep. 647: Baker v. Wilson, 3 ib. 168; 3 U. S. Dig. 74, § 100.

3. There cannot be *two* overseers of the same precinct at the same time. There can be only *one*. He is to be appointed by the *Commissioners' Court*, and holds his office for the term of two years. And he cannot resign, unless he does so within ten days after he is served with notice of his appointment. Clay's Dig- 509, § 11; ib. 510, § 13; Spann v. The State, 14 Ala. Rep. 588.

4. The Commissioners' Court appointed Jones overseer of the precinct in question, at its August Term, 1850. Jones was served with a copy of his appointment, and has never resigned, nor been removed, and is under no disability. By this appointment of Jones, the court, and each member thereof, emptied and divested themselves of jurisdiction, and cannot resume it until it reverts to them by the occurrence of some of those events or disabilities, which, either temporarily or permanently, in judgment of law, *vacates* the office—such as the death of Jones, &c. Justices of Inf. Court v. Selman, 6 Georgia Rep. 432; Griffith v. Frazier, 8 Cranch, 9; Cummings v. Clark, 15 Vermont, 653; Eaton v. Fullet, 11 Illinois Rep. 491; Elliott v. Piersoll, 1 Peters Rep. 341.

5. By statute (Clay's Dig. 509, § 11), "*the judge of the County Court* shall have authority of making temporary appointments and filling vacancies which may occur from any cause." But such judge has no authority to *create* a vacancy, nor to appoint an *additional overseer*, when one has been already appointed by the court, and is under no disability.

Neither the judge nor the court can appoint an overseer, when there is already one in office who has not been removed, who has not resigned, and who is still living in the county, and under no disability, and has not served out his time. Shepard v. Lane, 2 Dev. Law Rep. 148; Powell v. The State, 15 Ohio Rep. 579. The want of jurisdiction may be shown, even in opposition to the recital of the record. 3 Phil. on Ev. 800–801; Harvey v. Huggins, 2 Bailey's Rep. 252.

6. The appointment of Roberts as overseer on the 24th of February, 1851, is *void*, for the reasons above shown, and also for the following reasons:

I. The office was filled by Jones; it was *the property* of Jones, and conferred on him certain privileges, powers, and exemptions; and he could not *be deprived* of them nor of the office in any such mode. Wammack v. Holloway, 2 Ala. Rep. 31; Hill v. The State, 1 Ala. Rep. 559; 9 ib. 345.

II. It purports to be the act of the *Commissioners' Court.* Thus regarding it, it is void on its face, because *the court* could not act at *that time* (24 February, 1851). It has its fixed terms, and this does not appear to have been an *adjourned term* or a *regular term.* 3 Phil. on Ev. 1003.

III. It cannot be sustained as an appointment by *the judge of the Court*, because he had no power to make it, and because it does not *appear on its face* that *he* either had power to make it, or that in fact *he* did make it. No appointment by the judge alone is valid, unless it appears on its face to be his act, and that it is a "temporary appointment" or the filling of "a vacancy." 3. Phil. on Ev. 1002, citing Ladbroke v. James, Willes' Rep. 199; Small v. Parnell, 31 Maine, 267; Denning v. Corwin, 11 Wend. 651; Allison v. Hampton, 11 Humph. Rep. 381; Bishop's Heirs v. Hampton, 15 Ala. Rep.; Harvey v. Huggins, 2 Bailey's Rep., 252.

IV. He was not the agent of the law, nor of the court, and his acts are incapable of confirmation. 2 Bouvier's Institutes, 27.

7. If the appointment of Roberts is not absolutely void, it is certain it could not take effect, or have any operation, until the first appointee (Jones) dies, or his office otherwise becomes vacant. The State *ex. rel.* Easley v. Spence, 7 Ala. Rep. 500.

8. Inasmuch as Jones had not opened the road, and Rob-

erts had no authority to do so, the acts of Roberts in going upon the land of Mrs. Thompson and pulling down her fences, were trespasses, not lawful official acts. And as the acts of Roberts were trespasses, it could not be an indictable offence for Mrs. Thompson to put up her fences. The court is bound to hold that the acts of Roberts were official lawful acts or trespasses. It is too plain for argument, that his acts are not lawful official acts.

9. The charge denies the plaintiff in error the benefit of such reasonable doubt as the jury might entertain of her guilt. The court tells the jury to find her guilty if they believe the evidence. Now the jury might believe the evidence, and still entertain a reasonable doubt. Men may believe many things, and still have reasonable doubts about their existence.

Flournoy v. Clements, 7 Ala. Rep. has no application to this case. That was a case where the person came into office under color of lawful authority. Here there is no color. The appointment is void on its face, and is no justification, even to the appointee. He could not even be indicted as an overseer. Duckworth v. Johnson, 7 Ala. Rep. 578; Crampton v. Newman, 12 Ala. Rep. 199.

Neither the Commissioners' Court nor the lawful overseer, Jones, can ratify or adopt the act of Roberts in pulling down the fences and opening the road, because it was an act without lawful authority and void. Perkins v. Reed, 14 Ala. Rep. 536. This last case really overturns Flournoy v. Clements, 7 Ala. Rep.

The appointment of Roberts must be assailed collaterally, or else it cannot be assailed at all; because it was *ex parte;* and no certiorari or writ of error will lie to revise such appointment.

M. A. Baldwin, Attorney General, White & Parsons, and J. J. Hooper, for the State:

This case presents but this single question; are the official acts of a ministerial officer *de facto* valid when called collaterally in question? The following authorities are conclusive to show they are. Flournoy v. Clements, 7 Ala. 535; Plymouth v. Painter, 17 Cow. 585; People v. Covert, 1 Hill, 674; Wilcox v. Smith, 5 Wend. 232; McInstry v. Tanner,

9 John. 135; People v. Collins, 7 John. 551; Caskey v. The State, 6 Ala.

LIGON, J.—The act of 1836 (Clay's Dig. 509, § 11), provides that "the judge of the County (now Probate) Court shall have the authority of making temporary appointments, and filling vacancies, which may occur from any cause, in either of said offices, (apportioners of hands and overseers of roads), and is hereby required to do so." This act invests the judge of the Probate Court, without the aid of the Commissioners of Revenue and Roads, with full power to fill any vacancies in the office of overseer of roads, after a regular appointment has been made, and a vacancy arises from any cause whatever.

The power to make such appointments is as clearly conferred by this statute on the judge of the Probate Court, as that of appointing a sheriff, when a vacancy occurs in that office, is, by the constitution, given to the governor of the State. In the latter case, this court has held, that an appointment made by the governor, when a vacancy was supposed to have existed, when, in fact, none had really occurred, conferred on the appointee such right to exercise the functions of the office, as to render his acts done therein valid, so far as they concern the public and the rights of third persons. Such an appointment, emanating from the proper authority, and being regular on its face, will constitute the appointee a sheriff *de facto*, even though there be another who *de jure* is entitled to the office; and where the latter has ceased to perform the duties of the office, and the former does perform them, his acts are not void. Flournoy v. Clements et al., 7 Ala. Rep. 535.

Such an appointment is not absolutely void, but irregular, and voidable only. The true distinction between those irregular appointments to office which are void, and those which are voidable only, I apprehend to be this; where the authority under which the officer assumes to act, shows, upon its face, that it emanates from a power which had no right to confer it, it is void; but where it is regular on its face, and emanates from a source which has the legal or constitutional right to bestow it, and it requires a reference to facts not dis-

closed in the commission or order of appointment, to show that the power of appointment has been illegally or irregularly exercised, the appointment is voidable only. In the former case, all the acts of the appointee, done in reference to such appointment, are void for every purpose; while in the latter, they are valid as to the public and third persons; and this, for the reason, as it has been well said, that "the affairs of society cannot be carried on upon any other principle. 1 Stew. 182; 5 Wend. 231.

Apply these principles to the case under consideration, and it is clear that, although Jones was, *de jure*, the overseer of that part of the road which the plaintiff in error obstructed, yet, Roberts, having an order of appointment from the judge of the Probate Court, regular on its face, and emanating from the proper authority, was, *de facto*, overseer of the same road, and his acts in opening it are valid as to the public and the plaintiff in error. She could not, therefore, call them in question in a collateral proceeding, and cover her own misdemeanor under his supposed want of authority.

It is no objection to the regularity of this appointment, that it is tested by the judge of the Probate Court as clerk. By the act organizing that court, the judge is *ex officio* the clerk thereof, and having made the appointment of Roberts as judge, he was bound by law to issue a copy of the order appointing him as clerk, in which capacity the copy in this record seems to have been issued. Clay's Dig. 509, §§ 11 and 12. The court, therefore, did not err in instructing the jury that the commission of Roberts was not void.

It is insisted, however, that the court erred in that portion of the charge in which the jury was instructed, that "if they believed the testimony, they ought to find the defendant guilty." It is urged that this charge was wrong, as it tended to deprive the accused of the benefit of any reasonable doubt of her guilt, which the jury might entertain. We do not so understand it. The testimony recited in the bill of exceptions is said to be all, or the substance of all, which was given on the trial. It proceeded entirely from the State; it is without conflict, and establishes, beyond a doubt, the guilt of the accused. But a single point appears to have been made in the defence, viz: that Roberts had no authority

under his appointment, to open the road, and of this the court was the proper judge, as it involved a conclusion of law, and not of fact. Under these circumstances, it was not error for the court to say to the jury, that, if they believed the evidence, they should find the accused guilty.

We have repeatedly held, that, where the testimony proceeds altogether from one party, and involves no conflict, the court may draw its own legal conclusion, and give it in charge to the jury. If the party against whom such charge is given desires it to be qualified, he must request the court to do so. 20 A. R. 179; 15 ib. 176; 13 ib. 713; 6 ib. 753; 1 ib. 623; 7 Por. 258; 9 ib. 39. There is no tendency in such a charge to deprive the accused of the benefit of all reasonable doubt of her guilt which the jury might entertain; for, if the testimony was credible, her guilt was placed beyond all reasonable doubt, and the question of the degree of credit to which it was entitled was expressly referred to the jury in the charge itself; for, I take it, that no man can be said to believe testimony, when he has a reasonable doubt of its truth.

Let the judgment be affirmed.

HOGAN *vs.* REYNOLDS.

1. When a judgment is recovered against the surviving partners on a firm debt, and the amount of the judgment is afterwards paid to the plaintiff by a stranger, with money furnished him for that purpose by one of the defendants and the executor of the deceased partner, the judgment is satisfied, and it cannot be kept alive, by assignment to such third person, for the purpose of enforcing the collection of it from the other defendant.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. E. PICKENS.

Walker Reynolds commenced a suit, on a firm debt, against the firm of James A. Hogan & Co., which was composed of James A. Hogan, John F. Tompkies and John Hardie. Hardie died pending the suit, and judgment was afterwards

rendered against the two surviving partners. After the rendition of the judgment, Benjamin A. Smoot paid the full amount of it to the plaintiff, and took from him an assignment of the judgment. The money so paid to Reynolds by Smoot did not belong to the latter, but was furnished to him by Tompkies and the executor of Hardie, each furnishing one half; and the money advanced by Hardie's executor belonged to the estate of his testator.

Upon this state of facts, James A. Hogan moved the Circuit Court to have satisfaction of the judgment entered. A jury was empannelled to try the issue; and the court charged them, that the money furnished to Smoot by Tompkies operated as a satisfaction *pro tanto* of the judgment, but that the money furnished by Hardie's executor did not; to which charge Hogan excepted. The jury returned a verdict, that the cost and one half of the principal was unpaid; whereupon the court ordered the judgment to be satisfied according to the verdict, leaving unsatisfied the cost and one half the amount of the judgment.

Hogan now brings the case to this court, and assigns for error; 1. The charge of the court; 2. The matters disclosed by the bill of exceptions.

WATTS, JUDGE & JACKSON, for plaintiff in error:

The question presented by the record, is this: Does a payment by, or a transfer to, the representative of a deceased partner of a judgment obtained against the surviving copartners, on an indebtedness upon which the estate of such decedent is liable, operate as an extinguishment of the same?

In case of a judgment against all the co-partners, it is clear that one could not thus purchase and use the judgment; and the *principle* applies in full force, where there is no judgment, but, as in this case, an *admitted liability.*

It is a familiar principle, that one co-partner cannot sue another at law, whilst the partnership affairs are unsettled, and no balance struck.

This court has held, too, in many cases, that a sheriff paying a judgment, cannot use the execution against the defendant. Rutland's Admr. v. Pippin, 7 Ala. 469; Roundtree v. Weaver, 8 Ala. 314; Crutchfield v. Haynes et al. 14 Ala. 49.

And even a surety, whose equity is certainly equal to that of a co-partner, cannot pay the judgment and use the execution to reimburse himself out of his principal. Morrison et al. v. Marvin, 6 Ala. 797; Abercrombie v. Connor, 10 Ala. 293; Thompson v. Wallace, 3 Ala. 132. See, also, Chandler et al. Exrs. v. Shehan, 7 Ala. 251, deciding that a party liable to pay a debt cannot sue upon it.

But the following citations are deemed to be more in point, and, in *principle*, conclusive: Bartlett & Waring v. McRae, 4 Ala. 688; Avery & Woodcock v. D. & B. Petten, 7 John. Ch. Rep. 211; Milton v. Codd et al., 7 Barn. & Cres., 419; Teague v. Hubbord, 8 Barn. & Cres. 345; Bank U. S. v. Winston's Exr. et al., 2 Brock. 232.

RICE & MORGAN, *contra:*

1. Even if it be conceded that the payment of a judgment by one who is technically a party to the note or bill or receipt on which the judgment is founded, and also a party to the judgment, is, *per se*, *a satisfaction*, yet it is clear, that an advance of the money by one who *is not a party to the judgment,* or the cause of action on which it is founded, to the plaintiff in the judgment, does not annul or satisfy the judgment; especially if the plaintiff agrees or consents that the judgment shall stand open, for the re-imbursement of the person making such advance. Clason v. Morris, 10 Johns. R. 525; Lyon v. Bolling, 9 Ala. 463; Leach v. Williams, 8 Ala. 764.

2. Hogan and Tompkies were *surviving partners*, and the only defendants in the judgment. As surviving partners and defendants in the judgment, they were bound to pay off the debt, and were entitled to all the partnership property for that purpose. There was no duty on John T. Hardie to pay. He was not a partner, nor a party to the debt or judgment. And although he may have been executor of the *deceased partner*, that did not affect the case.

It is clear there is no error in the judgment below, of which Hogan, a surviving partner and defendant in the judgment, can be heard to complain.

DARGAN, C. J.—The case of Bartlett & Waring v. Lang,

4 Ala. 688, fully sustains the plaintiff in error, and shows that the court erred in the charge given to the jury. In that case, Bartlett & Waring had recovered a judgment against McRae, as surviving partner of McRae & Lang, on which execution had been issued, and was returned no property. After this, they sued Mrs. Lang, as the administratrix of Willis Lang, the deceased partner, and obtained judgment against her. She then paid the amount of the judgment to Bartlett & Waring against McRae, and took an assignment of it to herself. McRae afterwards moved the court to quash the execution, and to have satisfaction of the judgment entered. This court held, that Mrs. Lang could not, by paying the amount due on the judgment, and taking an assignment of it, continue it in force for the purpose of having execution against McRae, the surviving partner. The case at bar falls directly within this decision; for, though the judgment was assigned to Smoot, it was paid, in part, by Tompkies, and in part by John T. Hardie, as executor of John Hardie, deceased; that is, Tompkies and John T. Hardie furnished the money to Smoot, who paid the judgment to Reynolds, and the money furnished by John T. Hardie belonged to the estate of John Hardie, deceased, who was bound for the debt as a co-partner. Reynolds, therefore, has received his money, and from those who were liable to pay it. This is a satisfaction, and the judgment cannot be kept on foot to coerce collection out of Hogan, for the benefit of the other members of the firm.

The rule established by the case of Bartlett & Waring v. Lang, may be thus stated: If a judgment is paid by one *who is a principal* in the debt, and, as such, is bound to pay, he cannot, by obtaining an assignment of the judgment, keep it alive in order to coerce payment from his co-principal; and we cannot permit him to do, in the name of another, what he would not be allowed to do in his own.

Let the judgment be reversed, and the cause remanded.

CHILTON, J., did not sit in this case.

ROBY *vs.* LABUZAN.

1. The process of garnishment relates only to the time of its service; and if there is no indebtedness at that time from the garnishee to the defendant in the attachment, the plaintiff is not entitled to a judgment, although it may appear that between the time of service and answer the garnishee became indebted, and paid the debt to the defendant in attachment.
2. The legal rights only of the defendant in attachment can be reached by process of garnishment, that is, such debts as he can himself enforce by suit at common law, and also, such property as would be liable to seizure and sale under execution against him, if the sheriff could get possession of it.
3. Before the service of the garnishment, the garnishee had shipped to New Orleans a lot of cotton belonging to the defendant in attachment, on which he had made a large advance of money, to be reimbursed from the proceeds of the cotton when sold. After the service of the garnishment, *but before answer*, the cotton was sold, and the proceeds were paid to the garnishee, who retained the amount due him for advances, and paid the surplus to one claiming to be the transferree of the defendant in attachment. *Held*, That the plaintiff was not entitled to judgment against the garnishee, on the above state of facts.

ERROR to the Circuit Court of Mobile.

Tried before the Hon L. GIBBONS.

This suit was commenced by attachment by the plaintiff in error against Aaron H. Jones, and Labuzan was summoned as a garnishee. He appeared and answered, denying generally that he was indebted to Jones, or that he had any effects of his in his possession, and then stated, in substance, the following facts: That in February or March, 1851, he shipped, at the request of Jones, to the firm of Buchanan, Carroll & Co., of New Orleans, a quantity of cotton, on which he had made a large advance of money, to be reimbursed from the proceeds of the cotton; that the cotton, in pursuance of the instructions of Jones, was delivered to him by the late firm of Curry, Desmukes & Co., of Mobile, who were the agents of Jones in making the shipment; and that he, the garnishee, paid the amount advanced, partly to Curry, Desmukes & Co., and partly to Jones himself; that said shipment was made before the service of garnishment, and at the date of the service had not been sold by Buchanan, Carroll & Co., nor had the advances thereon made by the garnishee been paid;

that Jones was a member of the firm of Curry, Desmukes & Co., but the cotton belonged to him individually; that at the time the shipment of the cotton was made, Jones directed the garnishee to be governed by the instructions of Curry, Desmukes & Co. respecting the sale of the cotton or its proceeds, and to pay to Curry, Desmukes & Co., as his agents, all further advances on said cotton, or the proceeds thereof. He further answered, that after the service of the garnishment, the cotton was sold in New Orleans, and the proceeds of sale remitted to him; and after deducting therefrom the amount of the advanees, there remained in his hands thirteen hundred and eleven $\frac{48}{100}$ dollars, which balance he had paid over to Edward Curry, a partner of the late firm of Curry, Desmukes & Co., under the directions given by Jones to the garnishee, and on the claim of said Curry to be entitled to the same, as a partner of the late firm of Curry, Desmukes & Co., on the ground that such balance had been transferred by Jones to the firm. But the payment to Curry was made with the understanding, that it should be refunded to the garnishee, if the funds were adjudged liable to the attachment. That after the shipment of the cotton, the firm of Curry, Desmukes & Co. had been dissolved, and Curry was charged with the settlement of its affairs; and that he had been notified that Jones was indebted to the firm in about the sum of two thousand dollars.

Upon this answer, a notice was issued to Curry, requiring him to appear and contest his claim to the money and the validity of the transfer by Jones to Curry, Desmukes & Co. Curry and Desmukes appeared, and a question arose, how the issue should be made up. The plaintiff in the attachment contended, that Curry & Desmukes should allege the validity of the transfer, that he might controvert it; but the court ruled, that the plaintiff should allege that the funds were liable to the attachment; in response to which, Curry & Desmukes might set out their transfer, and aver its validity. And so the issue was made up; but the plaintiff excepted. A trial was had, and several objections were taken to the ruling of the court, but it is unnecessary, from the view taken of the case by the court, to state them.

GEO. N. STEWART and PERCY WALKER, for plaintiff in error:

A surplus, after satisfying a previous claim, may be attached. 15 Mass. 490; 1 Pick. 400; 6 Ala. 160.

The attachment should reach all property in the hands of a garnishee, as well at time of answer as at time of summons of garnishee. Serg. on At. 101—88—91.

The consignee is entitled, always, to retain his own debt, and is liable only for the surplus, as a garnishee. Serg. on At. 82—3—93; 16 Mass. 320; 8 Pick. 280.

It is no objection that the amount is not ascertained. The court will, if necessary, stay the proceedings till sales made, and amount ascertained remaining in garnishee's hands. 16 Mass. 275—8—80; 8 Pick. 280; 3 Murphy, 256; 20 Vermont, 382; 14 Mass. 272.

Money growing due on a contract may be attached, and proceedings will be stayed till it falls due. Serg. on At. 65--94.

That the goods are out of the State, makes no difference, if under the control of the garnishee. 6 Pick. 358.

In this respect, the liability of the garnishee would be like that of a defendant in trover. 3 Murphy, 256.

It is not indispensable that there be a strictly technical cause of action at the time of the commencement of the garnishment against the garnishee. It is sufficient if he have goods in his possession. 18 Vermont, 590.

WM. G. JONES, *contra:*

1. The charge of the court was correct, and the charge asked by the plaintiff was properly refused. The garnishment relates to the present time: that is, to the time of its service. It does not affect funds which might come to the garnishee's hands after the service of garnishment, though before answer. The Branch Bank at Mobile v. Poe, 1 Ala. 396; Hazzard v. Franklin, 2 Ala. 349—351; Payne v. The Mayor and Aldermen of Mobile, 4 Ala. 333. There was no indebtedness of Labuzan to Jones at the time of the service of garnishment. It was then the other way, for Jones was then largely indebted to Labuzan. Whether any funds of Jones's would ever come to Labuzan's hands, or whether he would ever be indebted to Jones, was a mere contingency, or

a bare possibility, depending entirely on whether the cotton would sell for more than enough to reimburse the advances or not; or, if sold for more, whether the surplus should come to Labuzan's hands. Such a contingent or possible future debt is not reached by garnishment. 4 Ala. 334.

2. It is insisted that there was no error in the decisions of the court; but if there was any error, it was one by which the plaintiff could not have been prejudiced, and, therefore, this court will not reverse the judgment, even if there were error. Smith v. Martin's Exr. 18 Ala. 819—821; Smith & Gary v. Aubrey, 19 Ala. 63—66; Shehan v. Hampton, 8 Ala. 942—947, and cases there cited. This plainly appears from the record. The plaintiff had no right to call in Curry and Desmukes on Labuzan's answer. The statute (Clay's Dig. 63, §§ 39 and 50,) applies only to cases where the garnishee admits an indebtedness at the time of service, and continuing up to the time of answering, but the right to which he has been notified has been transferred to another. There must be a fund in the garnishee's hands. If he has paid it over to the transferree, whether rightfully or wrongfully, it cannot be gotten back from the transferree by this mode of proceeding. Here the garnishee denied any indebtedness, and stated that he had paid over to Curry and Desmukes the proceeds which afterwards came to his hands. It is obvious the plaintiff can never get a judgment.

DARGAN, C. J.—The decisions of this court have settled the question, that the process of garnishment relates only to the time of its service; and if there is no indebtedness at that time from the garnishee to the defendant in the attachment, the plaintiff will not be entitled to judgment, although it may appear, that, between the time of service and answer, the garnishee became indebted, and paid the debt to the defendant in attachment. The Branch Bank at Mobile v. Poe, 1 Ala. 396; Hazard, admr. v. Franklin, 2 Ala. 349; Payne v. The Mayor and Aldermen of the City of Mobile, 4 Ala. 333. In the case cited from 2 Ala., it was said, that even if the garnishee held notes on others belonging to the defendant at the time of the service of the writ, and which were subsequently paid to him, still, as there was no actual indebtedness

from the garnishee at the time the garnishment was served, the plaintiff was not entitled to recover. Hazard v. Franklin, *supra*. It is, however, urged, that these decisions take too narrow and restricted a view of this remedy, and are contrary to the decisions of the other States of the Union, as well as the decisions of England, upon process of this kind, arising out of the custom of London.

I admit that the courts of Massachusetts, Pennsylvania, and some other States, hold a different rule, and, in England, the rule seems to be, that the garnishee may answer or plead immediately, if he has no funds, and thus discharge himself; but if he does not, and waits until he becomes indebted, or has property in his hands belonging to the defendant, he must then answer as to such property or indebtedness: the issue relating to the time of the answer, and not to the time of the service of the process. 3 East, 374.

I confess, that if the question was an open one, I should be disposed to hold in conformity with the English decisions, which have been adopted by most of our sister States in which the question has arisen. But our predecessors have settled the rule otherwise; it has become well known, and has constantly been acted upon, and we must yield to it.

But it is contended that the garnishee, though not strictly indebted at the time of the service of the writ, nevertheless had property in his possession, to-wit: the cotton, and that he is liable for the value thereof, over and above the advances made by him, to Jones, the defendant in attachment. To this argument, I cannot assent. The process of garnishment can reach only the legal rights of the defendant. What I mean by legal rights, is, that it reaches such debts as can be enforced by the defendant in the attachment by suit at common law, and also, such property as would be liable to seizure and sale, if the sheriff could get possession of it.

In the case of Harrell v. Whitman, 19 Ala. 135, we held, that the process of garnishment must be considered as a legal, and not as an equitable proceeding; and therefore, the defendant's right to the fund or property sought to be condemned, must be a legal, as contradistinguished from an equitable one; and in the course of that opinion, it was said, "If we ever depart from the plain rule, that an attachment and gar-

nishment can operate only on the legal rights of the defendant, there would be no stopping point, and we should have to go the full length, that equitable rights might be attached by garnishment in a suit at law; and thus a court of law would become invested with cognizance of equitable rights, and bound to ascertain and condemn them, however difficult the task might be, or however incompetent the powers of the court for this purpose." That decision is well sustained by the previous adjudications of this court, and we feel no inclination to depart from it.

It may, however, be said, that the right of Jones to the surplus, after paying the advances, is a legal, and not an equitable right. I admit it is so, after the money came into the hands of Labuzan, the garnishee; but, considering the cotton as property at the time of the garnishment, and we are bound so to consider it, it is very clear that it could not have been levied on in the possession of the garnishee, who had made advances upon it. The defendant in the attachment had parted with the possession and control of the cotton, and was only entitled, after the sale, to the surplus, if any, after paying the amount advanced to him. In that condition, the cotton was not subject to execution at law, and I do not see how it could be liable to attachment. An attachment can be levied only on such property as is the subject of levy and sale under execution; and if one be garnisheed on the ground that he has property of the defendant's in his possession, or under his control, it must be shown that the property is such as is the subject of levy and sale under execution. If, then, we consider the cotton as property in the possession of Labuzan, it could not be sold under legal process against the defendant, and, consequently, it cannot be reached by process of garnishment; and if we consider the right of Jones as the mere right to demand the surplus of the money it might bring, after the payment of the advances made by Labuzan, then the decisions we have referred to furnish the decisive answer, that at the time of the service of the writ, there was no debt due from the garnishee to the defendant in the attachment.

It may be, that our decisions have so restricted the operation of this process as to lose some of the benefits that credi-

tors might have derived from it; but we deem it best to adhere to them, and let the legislature extend the remedy.

As we come to the conclusion that the plaintiff is not entitled to a judgment against the garnishee, even admitting that he had paid over the money to Jones himself, or to Curry, Desmukes & Co., as the agents of Jones, it is unnecessary to examine the questions growing out of the contest between the plaintiff and Curry, Desmukes & Co., who claimed to be the transferrees of the money paid by Labuzan to them.

Let the judgment be affirmed.

NOLIN *vs.* PARMER.

1. The boundaries of sections of land have been fixed, and their lines and corners marked, by the Government of the United States, and the boundaries thus marked and established, cannot be altered or controlled by any other survey; but the lines run to divide the sections into halves and quarters, if erroneous, may be corrected; for they are subdivided by law, and if the officer, in running the subdivision line, makes a mistake, it can be corrected by running the line according to law.
2. Although an *ex parte* survey, made by a county surveyor without an order of court, may not within itself be evidence, yet the surveyor may be examined personally to prove the boundaries of the land, and may illustrate his evidence by his own survey; and when the surveyor, by his own testimony, has proved the accuracy of his survey, it may then go to the jury, as testimony tending to prove the locality of the land and its boundaries.
3. The parol testimony of the surveyor in such case is admissible, although he testifies that all his knowledge respecting the boundaries of the land was derived from the survey which he had made.

ERROR to the Circuit Court of Barbour.

Tried before the Hon JNO. GILL SHORTER.

BELSER & RICE, for plaintiff in error:

1. The United States, in providing for the survey of the public domain, have established rules by which all disputes that may arise about boundaries, or the contents of any section or sub-division of a section, shall be ascertained. In the case of sections, the Government has arranged their bounda-

ries, marked their lines and corners, and declared their contents; and the purchaser of an entire section takes all within those limits, be it more or less than the quantity returned by the surveyor.

But, in the purchase of a less quantity, (of only eighty acres, as in this case), the contents of the several parts of the section must be determined with reference to the entire section; and the purchaser of one-eighth of a section is entitled to one-eighth of whatever the section contains; especially if it does not appear that the contents of such subdivision has been returned by the surveyor general. Walters v. Commons, 2 Porter, 38.

2. The county surveyor of each county of this State is a lawful officer, whose powers and duties are prescribed by law. Among other duties assigned to him by law, the following are here pointed out: "To make all surveys of lands lying in the county of which he is surveyor, and to which the United States have no claims, at the request of the owners or proprietors thereof; and, generally, to do whatsoever in the re-surveying, measuring and dividing of lands, may be required of him, by any person wishing the same done;" * * * * * "whenever called on for that purpose, to re-survey, and re-mark and bound any tract of land in his county," &c. &c., "taking special care, in all such cases, to be governed by the original surveys, patents or title deeds of such tracts; and the said surveyor shall make a plain report and certificate of all such re-marks and boundaries," &c. &c. Clay's Dig. 523, §1 to 7 inclusive.

3. A survey of an eighty acre tract of land, in the county of Barbour, by the county surveyor of that county, "honestly and fairly made, according to the best of his skill and knowledge, for the purpose of ascertaining the boundaries of said land," and duly proved by the surveyor himself, as a witness, on the trial of an action of trespass to try titles as to said land, is admissible evidence.

It is not a mere private survey, or survey made by an unofficial or private person. It is an official act, done in the strict and honest performance of a duty imposed by law upon the officer. And although made "*ex parte*," that is, "at the request of plaintiff," and without notice to the defendant,

still, it was official, and authorized by the statute. The law presumes that this officer, as well as every other, did his duty, and, therefore, that his survey was "governed by the original surveys and patent" of the tract. Parsons v. Boyd, 20 Ala.

4. The survey of the county surveyor was not offered to vary, control or contradict the original survey or the patent, but it was offered, in connexion with the positive testimony of the surveyor, to show the boundaries of the land in dispute, and that "the lands in dispute, and on which said trespasses complained of was committed, were embraced by plaintiff's patent." The testimony of the surveyor himself, aside from his survey, was competent, and should not have been excluded.

5. The testimony was admitted in the first instance without objection by the defendant; and "on cross-examination of the witness, (the surveyor,) he said, that all he knew of said lands, or its boundaries, was derived from said survey, made at the request of plaintiff." "Whereupon defendant moved to exclude said evidence, which was done."

The only objection made to this evidence is thus shown, by the record, to have been the fact stated by the surveyor, "that all he knew of said lands, or its boundaries, was derived from said survey." The objection being thus confined to one ground, was an admission by defendant, that, in all other respects, the testimony was competent. Creagh v. Savage, 9 Ala. 959.

6. It certainly was no valid objection to the admissibility of the survey itself, or the testimony of the surveyor, that his knowledge of said lands and its boundaries was derived from said survey. The statement itself, that "all he knew" was derived from the survey, necessarily implies, that, from surveying of the land, he had acquired a knowledge of the land and its boundaries; and if he had knowledge on these subjects, the testimony was clearly admissible. His testimony was the more weighty, if he derived his knowledge from the survey made by himself. How else could more satisfactory knowledge of boundaries be obtained than by a survey made honestly and fairly, with distinct reference to plaintiff's patent, and "for the purpose of ascertaining the boundaries" of the land in dispute—the eighty acre tract?

P. T. SAYRE, *contra:*

The bill of exceptions shows, that an attempt was made to prove an *ex parte* original survey, run by McKinney at the request of the plaintiff in error.

The title to the land was derived from the Government of the United States, and the court judicially knows that all lands sold by the General Government were surveyed prior to their sale.

All persons who purchase lands of the United States, take them according to the official survey, and are bound by the lines run by the United States' surveyor.

In all controversies, therefore, respecting lands purchased of the United States, it is not competent to prove any other survey, any other lines, or any other monuments, than those run and erected by the United States' surveyor. These can be proved by the official returns of the surveyor general, or by parol, by any one knowing them. But McKinney was not introduced for that purpose. His testimony proved nothing in reference to the United States' survey. He was offered to establish a private survey which he himself had made at the request of the plaintiff in error.

The fact to be established, was, that the lands sued for were embraced by plaintiff's patent, according to the official survey made by the United States' surveyor, and it made no sort of difference whether they were so embraced by McKinney's survey or not.

The rights of the parties were ascertained and fixed by the survey of the United States' surveyor before the purchasing of the lands, and they could not be affected by any subsequent survey.

The original survey was binding on the parties and the world, and their rights could only be established by a proof of the original survey. Surget v. Little, 5 Smedes & M. 319; May v. Baskin, 12 ib. 428; Jones v. Huggins, 1 Devereaux, 223.

The declaration shows that the lands claimed were sub-divisions according to the laws of the United States.

DARGAN, C. J.—This was an action of trespass, brought to recover possession of the following described land: the

east half of the north-east quarter of section twenty-six, township ten, range twenty-seven, situated in the county of Barbour. To show title to the land, the plaintiff introduced a patent from the Government of the United States, by which the land above described was granted to him. To identify the land, and prove that the defendant was in possession, the plaintiff introduced John McKinney, the county surveyor, who had surveyed the land at the plaintiff's request, but without any order of court, and without notice to the defendant. This witness proved the survey which he had made, and also, that, according to such survey, the land in dispute was embraced by the plaintiff's patent. Upon cross-examination, he stated, that all the knowledge he had respecting the boundaries of the land, was derived from the survey which he had made. The defendant then moved the court to exclude his testimony, which was done, and the plaintiff excepted.

As respects sections of lands, the Government of the United States have fixed their boundaries, and marked their corners and lines, and it is clear that these boundaries, thus marked and established, cannot be altered or controlled by any other survey. But the lines run to divide the sections into halves and quarters, if erroneous, may be corrected, for they are sub-divided by law; and if the officer, in running the subdivision line, makes a mistake, it can be corrected by running the line according to law. Walters v. Commons, 2 Porter, 38. But the Government of the United States has never run any lines for the purpose of dividing quarter sections into half quarter sections, but has simply prescribed how the quarter section should be divided. When, therefore, the question is to locate a half quarter section, or to prove the line that separates the two half quarters, how can it be done but by a survey? The answer must be, that the land must be surveyed in accordance with the lines and boundaries of the section; and if this is done correctly, the particular land can be ascertained beyond doubt.

The objection, however, is, (as we understand it,) that the survey being *ex parte*, and not made in pursuance of an order of court, is not evidence. But the county surveyor is required by law to survey any land lying in his county, at

the request of the owner. Clay's Dig. 353. And although such survey may not within itself be evidence, yet that the surveyor may be examined to prove the boundaries, and that he may illustrate his evidence by the survey so made, we entertain no doubt; and when the surveyor, by his own testimony, has proved the accuracy of his survey, it then may go to the jury as testimony tending to prove the locality of the land and its boundaries. When the question is, to ascertain the thing granted, or to apply the grant to its proper object, parol proof is always admissible, and the witness on the stand may, (if he can,) by way of illustrating his evidence, draw a plat or a diagram of the land, showing its locality and boundaries. None of the authorities referred to by the defendant's counsel deny this proposition; and we think it clear, that if he may do so, even on the stand, the survey which he is required to make by law may be used for this purpose.

But, it is again contended, that the parol evidence was inadmissible, because the witness said that all the knowledge he had respecting the boundaries of the land was derived from the survey which he had made. But we do not understand from this, that the witness intended to say, that all his knowledge was derived from the paper he held in his hand, representing the survey, but, rather, that his knowledge of the boundaries arose from the survey he had made: that is, by going on the ground and running the lines, he was enabled, at the time he was testifying, to describe the land sued for, and to speak of its boundaries. The language of the bill of exceptions does not convey the idea, that the witness' knowledge was derived from the figures or representations made by him on paper, but, rather, that his knowledge was derived from the fact that he had surveyed the land.

In any point of view we are able to take of this case, we think the court erred in rejecting the evidence, and the judgment must be reversed, and the cause remanded.

CARTER *vs.* DOE EX DEM. CHAUDRON.

1. When a conveyance under seal is executed by an agent, to constitute it the deed of the principal he, and not the agent, must appear from the body of the deed to be the grantor, and the deed must be signed with his name and purport to be sealed with his seal.
2. One seal may be adopted by any number of persons, and answer for all of them; and where the seal affixed might be regarded as the seal either of the agent or of the principal, since the seal of itself is incapable of identification as the seal of either, we must look to the body of the instrument, and construe it to be the deed of the party intended to be bound by it as grantor.
3. A deed was executed in these words: "This indenture made and entered into between J. K. (the principal) and S. H. G. (the agent,) both of Mobile city in the Alabama Territory, of the first part, and D. D. of the city and Territory aforesaid, of the other part, witnesseth: Whereas, the said J. K., by his certain letter of attorney under his hand and seal duly executed, dated March 23, 1818, amongst other things therein contained, did authorize the said S. H. G., in the name of him, the said J. K., and in his behalf, to execute deeds, make sale of such part of his lots and lands, tenements and hereditaments in the town of Mobile, county and Territory aforesaid, as by the said S. H. G. shall be thought fit to be sold. Now this indenture witnesseth, that, for and in consideration of the sum (and) covenants hereinafter mentioned, reserved, and contained, on the part and behalf of the said D. D. to be paid, done and performed, he, the said J. K., by his attorney, S. H. G., hath granted and sold, and by these presents (doth) grant, sell and convey, unto the said D. D. the lots," &c. (here follows a description of them,) "for the sum of fifty dollars each, making altogether the just sum of three hundred dollars, to be paid by the said D. D., his heirs, executors and administrators, to the said J. K., his heirs or assigns, so soon as the Government of the United States shall have confirmed to the said J. K., or his heirs, the title to the said bargained lots of land: To have and to hold the above specified lots, together with all the privileges and appurtenances thereunto belonging, unto the said D. D., his heirs and assigns forever: *Provided, nevertheless*, and it is the true intent and meaning of these presents, and of the parties thereunto, that the said D. D., his heirs, executors and administrators, shall pay, or cause to be paid, to the said J. K., his heirs or assigns, the yearly interest of eight *per cent.* on the said sum of three hundred dollars, until the covenants before mentioned are complied with, the interest to commence from the first day of this present month. January. In witness whereof, the parties have hereunto set their hands and seals. Mobile, January 18, 1819." (Signed) "S. H. G. [Seal] Attorney in fact for J. K."

   Held, 1. That the deed was well executed as the deed of J. K., the principal;
   2. That it conveyed to the grantee but a conditional fee, dependent upon the yearly payment of interest as therein provided;
   3. That the grantor and his privies, as to the legal title, are estopped by his deed from saying that it did not pass; and that, upon the confirmation of the grantor's title by the Government, the whole legal title vested in the grantee.

4. When an erroneous affirmative charge is given by the court, either of its own motion, or at the instance of the opposite party, and it is excepted to, it is unnecessary to set out in the bill of exceptions the evidence upon which it is founded.
5. A deed more than thirty years old, having nothing suspicious about it, is presumed to be genuine, without express proof, the witnesses being presumed dead; and when it is found in the proper custody, and is corroborated by enjoyment under it, or by other equivalent explanatory proof, it is allowed to prove itself.
6. When a deed is acknowledged by the grantor on the day of its date, it is a sufficient compliance with the statute, although the certificate of acknowledgment does not state that he acknowledged that he executed it on the day of its date.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. JOHN BRAGG.

EJECTMENT by Chaudron against the plaintiff in error, to recover certain lots situated in the city of Mobile. The statement of facts in the opinion is so full and complete, that it is unnecessary to repeat them here.

JOHN A. CAMPBELL, for plaintiff in error:

1. The secondary evidence of the existence and contents of the power of attorney from Kennedy to Duval was inadmissible. The law presumes the power to have been retained by Garrow, or to have passed to Duval, the purchaser. Inquiry should have been made of Duval's representatives, and the plaintiff should have sworn that he could not produce the deed. The power was not recorded. The vague recollections of a witness was very unsatisfactory testimony, which should not have been allowed, except as a matter of necessity. Garrow does not say he returned the deed to Kennedy. He merely presumes so, because he could not find it. The cases do not tolerate such laxity as appears here. 11 Ala. 239; 2 Ala. 144; 9 Porter, 40; 7 Peters, 99; 1 Porter, 229; 8 Porter, 529; 2 Ala., 58; 4 Ala., 458.

2. The deed from Duval to George Getz was not produced, but a copy merely. No inquiry was ever made for this deed of any one. The plaintiff did not swear that he could not produce it; nor was any diligence used to find it. The only fact proved concerning it was, that Getz had died in 1840, at Philadelphia, and that the person testifying did not know of any administration, and that there were no heirs. In all cases

there had been efforts to get the original; inquiries for the deed, of parties who had it, or might be supposed to have it, whether in or out of the State. Here none was made. Cases cited above; 5 Peters, 233. In this case it was shown that the lot had been sold, but no inquiry was made of the vendee for the muniment of title.

3. In the record there is the statement of another deed introduced, upon the statement that the grantee resided beyond the State, and the attorney had written for it without having received an answer. The cases require a larger diligence than either of these instances indicate.

4. We objected to the certificates of acknowledgment upon the authority of the case, 5 Porter, 413; 13 Ala., 370-652.

5. We insist that the deed purported to be made by Garrow, as attorney, cannot be considered as the deed of Kennedy. The instrument is sealed by Garrow, and he acknowledges that he signed, sealed and delivered it. The deed is the deed of Garrow. 4 Hill, 351; 23 Wend., 435; 2 Cushing, 337; 5 Peters, 319; 13 Metcalf, 498. The cases on the other side are cases of executory contracts, where the rule is not applied in the strictness that is used in deeds of real property. The distinction is explained by the Supreme Court of the United States in the cases cited; or there were circumstances patent upon the deed to show that the seal employed was the seal of the principal. In this case Garrow names himself in the premises as a party to the instrument. He closes the deed (*cujus testimonium* clause) thus: "In witness whereof the parties have hereunto set their hands and seals." Garrow signs and seals for himself; and this is fully shown by his acknowledgment, made contemporaneously, in which he describes the instrument as having been signed, sealed and delivered to Daniel Duval by him.

6. We insist the court erred in the interpretation it gave to the deed. The deed purports to be made for the "consideration of the sum, covenants hereinafter mentioned, reserved and contained, on the part of the said Daniel Duval, to be done and performed"—he grants and sells certain lots "for the sum of three hundred dollars, to be paid by the said Daniel Duval, his heirs, executors, administrators and assigns, to Joshua Kennedy, as soon as the Government of the United States

shall have confirmed to the said Joshua Kennedy, or his heirs, the title to the said bargained lots of land: *Provided, nevertheless*, that it is the true intent and meaning of these presents and the parties hereto, that said Daniel Duval, his heirs and assigns, shall pay or cause to be paid to the said Joshua Kennedy, his heirs or assigns, the yearly interest of eight per cent. per annum until the covenants before mentioned are complied with. The interest to commence the first day of this present month of January." We contend that the deed is a conditional deed, and may be avoided by the non-payment of the purchase money and entry. In this case the heirs of Kennedy recovered the land, and may hold without any other act upon proof of the non-performance of the condition. The authorities are conclusive to show that these are suitable words to form a condition. 2 Thomas's Coke, 5–6; 5 Viner's Ab., 47; 3 Comyn., 86; 5 Serg. & R., 385; Crabb on Real Prop., § 2140; 2 Co. Litt., 112–3; 1 Shep. Touch., 121; 5 Mass., 320–324.

7. The charge of the court to the effect, that the Price claim being confirmed to J. K. and other representatives of Price, inured to the benefit of Duval, to the exclusion of J. K., was erroneous. In 1818, at the date of this deed, J. Kennedy at most had but an equitable title to one half of the lands. Six years afterwards he gets a legal title to his one half, as well as to that of Wm. E. Kennedy. His legal title thus acquired for one half was but for one half. The equity of the heirs of Wm. E. Kennedy, at least to the extent of one half, was superior to the title of Duval. Duval cannot have the benefit of the doctrine of estoppel, for any save the interest to which Joshua Kennedy was entitled. The trust in favor of Wm. E. Kennedy's heirs could not be defeated by the conveyance of 1818 to Duval; nor by the acquisition of the legal title by the act of confirmation. The confirmation enured to the benefit of him who had the best right to call for it. The best right to one half was in the heirs of Wm. E. Kennedy. Wm. E. Kennedy never disposed of his legal estate, except to Joshua Kennedy in trust. The doctrine of estoppel does not apply to this case. Joshua Kennedy, as trustee, cannot be held to estoppels to which he was liable individually. 13 John., 463–4; 8 Cowen, 543–565–587; 9 Cowen, 271.

8. The evidence of the verdict in ejectment, and the ground

on which it was given, was inadmissible. It proceeded upon a matter of boundary, and the verdict was evidence of the line between the lands of J. Kennedy and Wm. E. Kennedy, as shown by the Mathews map.

9. The evidence of deeds made long after the deed to Duval, not calling for that deed, and while the property was in dispute, as evidence to construe and locate that deed, ought not to have been admitted. Such proof had no tendency to explain the Duval deed. Kennedy had lots for sale, and the grantees purchased lots he offered. His contract of sale and the deed he made contained no reference to Duval or to Duval's rights. The plaintiffs desired to raise the inference, because he had sold the rest of the land to others, and had made no sale of the lots claimed under the deed to Duval, that he had sold to Duval the particular land now claimed. Neither the fact of a sale, nor the location of the land in the instrument produced, could be properly shown by such testimony. There was no relation between these transactions. They occurred at long and distant intervals; were perfectly independent as to subject matter, parties, considerations, and the one transaction could not be legitimately explained by the others. This objection applies to the different deeds introduced, and a map of the square, as set forth in the bill of exceptions. The fact, that trespassers occupied those lands now claimed by Duval, would account for their not being sold; nor could any inference be drawn from the fact that Kennedy did not choose to make a different sale. It was shown in evidence that the Price title was not finally settled till 1837, and Kennedy died in 1838, and these lands were recovered in 1842. The dates of the deeds, &c., are taken from the record of the Kennedy case.

P. PHILLIPS, *contra:*

The deed was made January, 1819, and recorded the next month. It recites specifically the power of attorney which authorized it. The deed was more than thirty years old, possession had accompanied it, and this would of itself have been sufficient to presume the existence of the power. Doe, demise Farmer's Heirs, v. Eslava, 11 Ala. 1020; 1 Greenleaf on Ev. §149.

The evidence of the probable loss of the original was sufficient, especially when coupled with the evidence of the subscribing witness, Carpenter, that, in reference to this sale, Kennedy subsequently said, that "whatever Garrow had done was right."

Certified copy of deed from Duval to Getz, 7th May, 1820. Besides the lapse of time and the possession which followed the deed, proof was made that Getz died in Philadelphia, without any heirs or representatives in this State. Scott v. Rivers, 1 S & P. 22; Smith v. Armstead, 7 Ala. 702.

There was also produced, a mortgage from Getz to Duval for the premises, which, it is recited, are the same as is conveyed by Duval, 7th May, 1820, which mortgage was duly recorded; the proceedings on a bill of foreclosure, and the master's deed under the decree, all of which substantiate the existence of the deed. There was, therefore, no motive to withhold the original, and no suspicion rests upon this transaction; and the rule as to the quantum of evidence to let in secondary evidence, rests very much upon these considerations. Toulman v. Juzan, 9 Ala. 694.

The objection to the probate of this deed is, that it does not state the day and the year. But the acknowledgment is tested, "this day and year last within written," which refers to the date of the deed; and the probate is thus, by reference to the body of the deed, made complete. Bradford v. Dawson, 2 Ala. 207.

That the deed was sufficiently executed by the attorney, is abundantly apparent from the body of the deed and the probate. Robinson v. Mauldin, 11 Ala. 984; Varnum et al. v. Evans, 2 McMullen, 409; Montgomery v. Dorion, 7 New Hamp. 475; Stringfellow & Hobson v. Mariott, 1 Ala. 575; Lazarus v. Shearer, 2 ib. 727.

Effect of the deed in conveying subsequently acquired title: 1. The deed contains the statutory warranty, "grant, sell, and convey;" and, in a subsequent part of the deed, the estate is referred to as the said "bargained premises." All the words of the statute are used, and the order constitutes no objection to their efficacy. 2. The language of the deed shows the clear intention that the subsequent confirmation should enure to the benefit of the vendee. The purchase

money was then to be paid, and until that time, interest on the purchase money; and though it may not contain a technical warranty, will operate as an estoppel *in pais*. Welland Canal Co. v. Hathaway, 8 Wend. 483; Derell v. Odell, 3 Hill, 221; Truscott v. Davis, 4 Barb. 498; Trull v. Eastman, 3 Metcalf, 124; 3 McLean, 79.

By force of the statute, the possession is transferred under such a deed as perfectly as if the party had been "enfeoffed with livery of seizin." Clay's Dig. 156, §35; Bliss v. Yancey, 1 Ala. 273; Matthews v. Ward's Lessee, 10 Gill. & J. 448; Bryan v. Bradley, 16 Conn. 474; Wells v. Prince, 4 Mass. 64.

It is not a mere release or quit-claim, but an absolute conveyance of the estate; and by the effect given to it by the statute of uses, it conveys not only the present estate of the grantor, "but barreth and excludeth him of all present and future right to the thing which is so conveyed." 2 Greenl. Cruise, 73.

The Price claim, in 1826, was represented by Joshua Kennedy; he applied for the confirmation of the claim in his own right, and, in 1829, Congress passed an act confirming his claim, and the patent issued to Joshua Kennedy and his assigns. This confirmation operated upon the title which Kennedy had conveyed to Duval, and enured to the benefit of the plaintiff, who held the master's deed under a decree in the foreclosure suit of Duval against Getz. Armstrong v. Chastang's Heirs, MS.; Nolen & Thompson v. Gwyn, 16 Ala. 728; Lands v. Brant, 10 How. 372; Van Rensselaer v. Kearney, 11 ib. 322.

Whether Joshua Kennedy was the legal owner of the whole estate prior to confirmation, can make no difference. At law, the title was vested in him by confirmation; and legal conveyances of property, though made before the confirmation, took the benefit of the title such confirmation gave to Kennedy; and it is not in an action of ejectment that we can weigh the equities of William E. Kennedy's heirs.

In the case between the Kennedys, reported in 2 Ala., it will be found that the bill sets out the sales by Joshua in the Price title, and only seeks to make his executors account for them; and the decree of the court proceeds on this view. The

decree declares that "Joshua and William were jointly interested in the Price claim." Further, "that complainants were entitled to an account of moneys received by Joshua Kennedy in his life-time, and by his executors since his decease, upon all sales of land embraced in the Price claim."

It was further decreed, that the complainants be admitted into possession "on an undivided half of the Price claim, save and except such parts thereof as were sold and conveyed by Joshua Kennedy, or the executors of the latter since his decease, and a deed was ordered to be prepared by the master," conveying to the complainants those lands, with the exception aforesaid. And yet, in the face of their own bill, and the decree in their favor, W. E. Kennedy's heirs now declare that the sales of Joshua Kennedy are not to be considered as conclusive, but that they still have a right to assert their interest as against the purchasers of Joshua Kennedy.

The history of this case shows, that from the earliest times Joshua and William exercised ownership over the lands contained in this grant. They each of them made many conveyances in the tract, which were always respected. About 1818, they made a sort of division, and executed a map, on which they marked their initials according to the division. This map was produced by defendant, and was submitted to the jury. The only question of fact was, whether the lot was governed by the present line of Government street to the south, or whether the call of the deed would carry, as defendant contends, altogether south of the present line of Government street. The jury found all the questions for the plaintiff, and the line of Government street, protracted upon this map, shows that these very lots are upon that map marked with the initials "J. K." This is the defendant's own evidence, and the monstrous attempt is now made, after the death of J. Kennedy and W. E. Kennedy, who lived in Mobile years after the sale by Garrow to Duval, and the long and continued possession held under deed, without complaint or disturbing the possessor, by the covetous heirs of Kennedy to assert there is still an interest, at any rate, for one-half, to them in the property conveyed by Kennedy's deed in 1819.

It is contended that the deed is conditional. In the court below, it was put upon the ground that the plaintiff had

not proved the payment of the money, and that this was necessary. It was argued that this was not required; and if it were, that the great lapse of time would be conclusive that it had been paid, notwithstanding the testimony of Garrow upon the subject, which, at most, was only of a negative character. There was no charge asked for by the defendant, because the judge, by a single charge, covered all the questions made by the defendant's counsel. Who could have raised the question, that the deed was conditional, but the defendant's counsel? Surely, it was not for the plaintiff. The court decided that the estate passed by the deed, though there was no proof of the fact of payment; that it was not conditional, nor could it be avoided for the non-payment of the money specified on its face, and that it was a valid instrument, &c.

It is insisted, however, that the bill of exceptions does not sustain the charge, and the deed, upon its face, is conditional. This is denied. It is not pretended that this is a condition precedent to prevent the estate from passing, but a condition subsequent, which will divest the estate. Now, granting this, the defendant would have to show, first, the non-payment of the money constituting the condition; and secondly, an entry for breach of the condition. If defendant offered no evidence to these points, even if the charge were erroneous, it could not injure him; and if he offered evidence, it should be spread by him on the bill of exceptions to show the error. An abstract charge will not cause a reversal, when it could not injure him. There is no evidence in relation to non-payment, except what has already been referred to, and this further evidence, that, in 1842, a recovery was had by the heirs of Joshua and Wm. E. Kennedy, in an action of ejectment against Magee. It is not pretended that this was an entry for condition broken. The recovery in ejectment was against a party who held adversely to the present plaintiff. Chaudron v. Magee, 8 Ala. 370.

It is expressly decided that the entry for a condition broken must be made with that express declaration. O'Brien v. Henry, 6 Ala. 787.

The case cited from 5 Mass. 325, is not in point; there the party had never given up the possession, and could not, there-

fore, make an entry; but here the condition was broken, if any, by the non-payment of the interest annually from 1819, and the non-payment of the principal in 1829, twenty or thirty years before the entry under the action of ejectment!

But we maintain that the deed is not conditional. There is nothing on its face to justify the idea. There is a time fixed for the payment of the principal, and a time for the payment of the interest; but because it is said that the money was to be paid to Kennedy, as soon as the Government shall have confirmed the title, this does not constitute the one the condition of the other.

Again: Wm. E. Kennedy, having parted with his interest, as shown by the map and the proceedings in chancery, and the confirmations of the Government, had no interest in this question; and having no interest, is not in the position of taking this advantage of this breach, even if one existed.

CHILTON, J.—This was an action ef ejectment brought by Chaudron against Carter, to recover certain real estate, consisting of lots in the city of Mobile.

The principal questions discussed, and to which we shall mainly direct our inquiries, relate to the sufficiency of the execution, and also to the construction, of a certain deed of conveyance under which the plaintiff below claimed; which deed was executed by one Garrow, as attorney in fact of Joshua Kennedy, and is in these words:

"This indenture, made and entered into between Joshua Kennedy and S. H. Garrow, both of Mobile city in the Alabama Territory, of the first (part,) and Daniel Duval, of the county and Territory aforesaid, of the other part, witnesseth: Whereas, the said Joshua Kennedy, by his certain letter of attorney under his hand and seal, duly executed, dated the 23d day of March, 1818, amongst other things therein contained, did authorize the said S. H. Garrow, in the name of him, the said Joshua Kennedy, and in his behalf, to execute deeds, make sales of such parts of his lots and lands, tenements and hereditaments, in the town of Mobile, county and Territory aforesaid, as by the said S. H. Garrow shall be thought fit to be sold. Now this indenture witnesseth, that for and in consideration of the sum (and) covenants hereinaf-

ter mentioned, reserved and contained, on the part of the said Daniel Duval, to be paid, done and performed, he, the said Joshua Kennedy, by his attorney, S. H. Garrow, hath granted and sold, and by these presents (doth) grant, sell and convey unto the said Daniel Duval," the lots, &c., (here follows a description of six lots, as the property conveyed,) "for the sum of fifty dollars each, making altogether the just sum of three hundred dollars, to be paid by the said Daniel Duval, his heirs, executors and administrators, to the said Joshua Kennedy, his heirs or assigns, as soon as the Government of the United States shall have confirmed to the said Joshua Kennedy, or his heirs, the title to the said bargained lots of land: To have and to hold the above specified lots, together with all the privileges and appurtenances thereunto belonging, unto the said Daniel Duval, his heirs and assigns forever: *Provided, nevertheless*, and it is the true intent and meaning of these presents, and of the parties thereunto, that the said Daniel Duval, his heirs, executors and administrators, shall pay or cause to be paid to the said Joshua Kennedy, his heirs or assigns, the yearly interest of eight per cent. on the said sum of three hundred dollars, until the covenants before mentioned are complied with; the interest to commence from the first day of this present month, January.

"In witness whereof the parties have hereunto set their hands and seals. Mobile, January 18th, 1819."

(Signed thus) "S. H. Garrow, [Seal]
Attorney in fact for J. Kennedy."

The questions arising upon this deed are: First. Is it well executed as the deed of Kennedy, the principal? Secondly. Is the deed conditional, leaving the title to be defeated upon the non-performance of the condition?

As to the first question: In Coombe's case, 9 Co. 75, authority was given by a copy-holder to two persons as his attorneys to surrender ten acres of pasture to the use of J. N. They made the surrender, and the entry on the court roll was, "that the said attorneys in the same court showed the writing aforesaid, bearing date, &c., and they, by virtue of authority to them by the said letter of attorney given, in full court surrendered unto the said lord the said ten acres of pasture to the use of said J. N.;" and the question was, whether the

said surrender was good or not. The court held, that it was good, and resolved, "that when any one has authority as attorney to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority." And when it was objected in that case, that the attorneys had made the surrender in their own name, for the entry was, that "they surrendered," it was answered and resolved by the court, "that they had well performed their authority; for, first, they showed their letter of attorney, and then they, by the authority to them, by the letter of attorney given, surrendered, &c., which is equivalent to saying, we, as attorneys, &c., surrender, &c.; and both these ways are sufficient. * * * But if attorneys have power by writing to make leases by indenture for years, &c., they cannot make indentures in their own names, but in the name of him who gives the warrant."

We are also cited, by the counsel for the plaintiff in error, to the case of the lessee of Clarke et al. v. Cantrey et al. 5 Peters, 319, in which it was held, that a power of attorney given by J. B. Clarke and Eleanor, his wife, to Carey L. Clarke, for the sale of lands, was not properly executed in the following form: "I, the said Carey L. Clarke, attorney as aforesaid, &c., do"—"In witness whereof, the said Carey L. Clarke, attorney as aforesaid, has hereunto subscribed his hand and seal, this 24th day of November, A. D., 1800. Carey L. Clarke, [L. S.]" It was said by the court, that the act of Clarke did not purport to be the act of the principals, but of the attorney; and hence, it fell directly within the influence of the rule laid down in Coombe's case.

Mr. J. Story, after citing Coombe's case as correctly stating the ancient rule of the common law, proceeds to state that "this rule, thus laid down, is regularly true in regard to solemn instruments under seal, although not, as we shall presently see, as to instruments not under seal. Therefore, if a person is authorized by a power of attorney to make a conveyance under seal of the lands of his principal, and he makes the conveyance by a deed in his own name, it will be a void conveyance. And it will make no difference in the

case, that in the deed the agent describes himself as such; as if he says "know all men by these presents, that I, A. B., as agent of C. D., do hereby grant, sell, convey, &c.; or if he signs and seals it, A. B., for C. D.; for in such a case it is still his own deed, and not the deed of his principal." Story on Agency, (2 Ed.) § 148.

The same doctrine is laid down by Mr. Paley in his work on Agency, (2d Am. Ed.) pp. 152–3. But this author further states the law to be, "that if the execution of the deed really appear to be in the name of the principal, the form of words used in the execution is not material; for in a late case, where the principle (that the deed must be in the name of the constituent) was recognized and affirmed, it was deemed sufficient, that opposite the seal was written "for S. B., (the principal,) M. W." (the attorney.) Wilkes v. Back, 2 East, 144. Mr. Paley further says: "Although in these cases of mere ceremonial acts it is indifferent in what order the names stand, whether the principal by the attorney, or the attorney for the principal, yet in the form of a contract made by the attorney the wording is material; as in an indenture of lease, it must in terms be conveyed by the principal, in whom alone the interest is; for the power of attorney, as such, vests no interest in him, and consequently none can pass from him. Therefore, if a lease were made in the name of an attorney, though it were added also, by virtue of a letter of attorney, or, by A. B., as attorney for C. D., it would be a void lease."

This doctrine has undergone elaborate investigation in most of the American courts, and the principle has been, with few exceptions, fully recognized, that the deed must be executed in the name of the principal, and where it is in the name of the agent, as agent for the principal, the superadded words as to the agency are to be regarded as descriptive of the person. Story on Agency, § 151.

In Townsend et al. v. Hubbard and Orcutt, 4 Hill, 451, it was held, by nineteen out of twenty senators, "that a sealed instrument, when executed by one acting as an attorney, must be executed in the name of the principal, and purport to be sealed with his seal." In that case, the deed, in the commencement, set out the names of the principals as the party of the first part, by their agent, H. B.; and "the par-

ties of the first part covenanted to convey," &c., and it concluded, "In witness whereof, the said H. B., as attorney of the parties of the first part, and the said parties of the second part, have hereunto set their hands and seals." (Signed) "H. B." [L.S.]

Walworth, Chancellor, said: "In an agreement not under seal, executed by an agent or attorney, in behalf of his principal, and where the agent or attorney is duly authorized to make the agreement, it is sufficient, as a general rule, if it appears in any part of the instrument that the understanding was, that the principal, and not the agent or attorney, was the person to be bound for the fulfilment of the contract. And even in the case of a sealed instrument, executed by an agent duly authorized by power of attorney under seal, no particular form of words is necessary to render it valid and binding on the principal; provided, it appears upon the face of the instrument that it was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is his seal, and not the seal of the agent or attorney merely:" citing Wilkes v. Back, *supra*. There being several parties to the instrument in that case, and but one seal, he conceded that it was not necessary to affix a seal for each party, if it appeared that the seal was intended to be adopted as the seal of all; but he maintained, that where it appeared that the seal used was the seal of the attorney, and not that of the principal, the latter was not bound.

Bronson, J., in delivering the opinion in Townsend v. Corning, in the Supreme Court, (23 Wend. 442,) said: "It is not enough that the body of the instrument is drawn in proper form. It is required to be signed and sealed, before it could become the deed of any one, and the signature and seal of one man could not make it the deed of another." See, also, upon this subject, 2 Kent's Com. 131; Frontin v. Small, 2 Lord Raymond, 1418; Harper v. Hampton, 1 Har. & John. 622–687; Scott v. McAlpin, 155; 1 Bouv.'s Bacon, 526; 2 Cush. 337; 13 Metcalf, 498; 5 Bouv.'s Bacon, 571.

Some of the courts seem to have overlooked the distinction taken in Coombe's case, between an act to be done *in pais*, and the execution of a naked authority by deed. This distinction is drawn with great clearness by the author last above

cited, who says: "This case, therefore, (of making leases by letter of attorney,) seems to differ from that of a surrender of a copyhold, or of livery of seizin of a freehold, by letter of attorney; for in those cases, when they say, "We, A and B, attorney for C," or, "by virtue of a letter of attorney from C." of such a date, &c., "do surrender," &c., or, "deliver to you seizin" of such lands; these are good in this manner, because they are only ministerial ceremonies, or transitory acts *in pais*, the one to be done by holding the court rod, and the other by delivering a turf or twig; and where they do them as attorney, or by virtue of a letter of attorney from their master, the law pronounces thereupon as if they were actually done by the master himself, and carries the possession accordingly; but, in a lease for years, it is quite different, for the indenture or deed alone carries the interest, and is the very essence of the lease, both as to passing it out of the lessor at first, and its subsistence in the lessee afterwards. The very indenture or deed itself is the conveyance, without any subsequent construction or operation of the law thereupon; and, therefore, it must be made in the name and style of him who has such interest to convey, and not in the name of the attorney, who has nothing therein." He says, in the conclusion, that "the attorney must put the hand and seal of the master, and so write the master's name, and deliver it as the act and deed of the master," which delivery agrees with making a surrender by holding the court rod, or making livery of seizin by turf or twig, and proves that there is a great diversity between an attorney making a lease in his name, as attorney, and a surrender of copyhold or livery of seizin of a freehold estate. 5 Bacon's Abr. by Bouv. 571–2; see, also, 2 Str. 705; Cro. Eliz. 115; Rolls Abr. 330; Hopkins v. Mehaffy, 11 Serg. & R. 126; Bogart v. DeBussy, 6 Johns. 94.

The cases of Montgomery v. Dorion, 7 New Hamp. 475; Magill v. Hinsdale, 6 Conn. 464, and, perhaps, the reasoning of Blackford, J., in the case of Deming v. Bullitt, 1 Blf. 241, are opposed to the view which is taken by the counsel for the plaintiff in error. See, also, a dissenting opinion of Dickinson, Senator, in Townsend v. Hubbard, 4 Hill, 361, where the opposite doctrine is attempted to be upheld, and the two last cases cited and relied upon. This doctrine received a

further support by the Court of Appeals of South Carolina, in the case of Varnum, Fuller & Co. v. Evans, 2 McMullen, 409, where it was held, that an instrument under seal, accepting the provisions of an assignment, and releasing certain debts, and in the body of which it was recited by the attorney: "I do hereby, by virtue of the authority vested in me, as aforesaid, in the name and in behalf of the said V. F. & Co., (the principals,) accept, &c., and do further release, &c." Signed, "J. W. [seal] agent for V. F. & Co.," was the deed of V. F. & Co. Oneal, J., in delivering the opinion, after stating the rule in Coombe's case, "that if attorneys have power, by writing, to make leases by indenture, for years, &c., they cannot make indentures in their own names, but in the name of him who gives them warrant," proceeds to say: "This is, I concede, the law governing all deeds made by attorneys, and to it their deeds must conform; but this is done whenever, as in this case, the deed declares it to be made in pursuance of the authority, and in the name and on behalf of the principal."

Three cases from our own reports have been cited, viz: Stringfellow & Hobson v. Marriott, 1 Ala. 573; Lazarus v. Shearer, 2 ib. 718; and Robinson v. Mauldin, 11 ib. 984. The case in 1 Ala., arose upon a warranty not under seal; that in 2 Ala., on a bill of exchange, drawn by the chief engineer of a railroad company, signing his name as such; and the case in 11 Ala. was, whether the acknowledgment of an attorney in fact, certified by the clerk as appearing before him in that capacity, that he (the agent,) signed, sealed, and delivered a certain specified deed, was sufficient, and it was held a sufficient acknowledgment.

The last decision falls directly within the influence of Coombe's case, and, like the surrender, may well be made in the way in which the party made it. To the other two cases, involving the construction of unsolemn instruments, a different rule of construction applies, which is, that the court will look to the whole instrument to gather the true object and intent of the parties; and if it appear that the principal, and not the agent, was intended to be bound, the court will disregard the irregularity or informality in its execution. This rule, it is said, is founded on public policy, for the further-

ance of commerce and convenience of trade. Story on Agency, §§ 154, 269, 270, 275, 276, 395 to 400, and cases cited by this author.

It is very clear, we think, that to constitute it the deed of the principal, he, and not the agent, must appear, from the body of the deed, to be the grantor; and the deed must be signed with his name, and purport to be sealed with his seal. In this case, Kennedy, the principal, grants and conveys; he is made a party of the first part with Garrow, the agent, and the attestation clause is: "In witness whereof, the parties have hereto set their hands and seals." This must mean the persons who compose the party of the first part; for, although the deed is in the form of an indenture, it is, in fact, a deed poll, and purports only to bind one party. It was very inartificially drawn, and as it was the manifest intention to bind the grantor as the party of the first part, we must consider the seal annexed, which purports to be the seal of "the parties," as his, although it may have been intended as the seal of the agent also. It is well settled, that one seal may be adopted by any number of persons, and answer for all of them. Ball v. Dunsterville, 4 Term R. 313; Mill Dam Foundry v. Hovey, 21 Pick. 417; Hatch v. Crawford, Adm'r. 2 Porter, 54.

Indeed, it is manifest, that since impressions upon wax, or other impressible substance, have been superseded by circumflex lines answering to seals, it would, in many cases, be impossible to identify the seal of the grantor as at common law; and the strictness of the common law rules has been relaxed in their application to such cases. And where, as in this case, the seal affixed might be regarded either as the seal of the agent or of the principal, since the seal of itself is incapable of identification as the seal of either, we must look to the body of the instrument, and construe it to be the seal of the party intended to be bound by the deed as the grantor, "*ut res magis valeat quam pereat.*" Reynolds' Heirs v. The Trustees of Glasgow Academy, 6 Dana, 37.

2. As to the question whether this is a conditional deed, and conveyed to the grantee but a conditional fee: The court is unanimous in the opinion, that the fee is conditional, dependent upon the yearly payment of interest as therein pro-

vided. It purports to be made in consideration of the sum and covenants threinafter mentioned, reserved and contained, on the part and behalf of the said Duval, to be paid, done and performed, &c.; and conveys certain lots to Duval, for the sum of three hundred dollars, to be paid by the said Duval, his heirs, &c., to Joshua Kennedy, as soon as the Government of the United States shall have confirmed to the said Kennedy, or his heirs, the title to the said bargained lots of land: "To have and to hold, &c., to the said Daniel Duval, his heirs, &c., forever: Provided, nevertheless, and it is the true intent and meaning of these presents, and of the parties thereunto, that the said Duval, his heirs, &c., shall pay, or cause to be paid, to the said Joshua Kennedy, his heirs, &c., the yearly interest of eight per cent. on the said sum of three hundred dollars, until the covenants above mentioned are complied with; the interest to commence from the first day of this present month, January."

The words which will constitute a condition, are stated by Mr. Crabb, in his work on real property, page 800 § 2140, to be "*sub conditione*," "*ita quod*," "*si contingat*," "*proviso*," "there being," &c. He says the word "*proviso*" may operate as a condition, although there be covenants before, if the words forming an entire sentence begin with "*proviso*," and be spoken by the feoffor, vendor or lessor, and the act to be performed or not performed be by the feoffee, vendee or lessee. Dyer, 311.

Lord Coke lays down the rules which must govern in determining when the word "*proviso*" shall constitute an estate or interest conditional, as follows: "When this word shall make an estate or interest conditional, these three things are to be observed: 1. That the *proviso* do not depend upon another sentence, nor participate thereof, but stand originally to itself; 2. That the *proviso* be the words of the bargainor, feoffor, &c.; 3. That it be compulsory to enforce the bargainee, &c., to do an act. Cromwell's Case, 2 Co. 70; Crabb, §2141. See, also, Browning v. Beston, Plow. 131, which was several times elaborately argued, and the old cases all collated.

But it is unnecessary to review the cases bearing on the question as to what shall and what shall not constitute an estate conditional. The books seem generally agreed to

assign to the words here used the force and effect of a condition.

In the first volume of the Touchstone, 121, it is said: "Conditions annexed to estates are sometimes so placed and confounded amongst covenants, sometimes so ambiguously drawn, and at all times have in their drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know, therefore, (says the author,) that, for the most part, conditions have conditional words in their frontispiece, and do begin therewith; and that amongst these words there are three that are most proper, which, in and of their own efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as *proviso*, *ita quod*, and *sub conditione;* and therefore, if A grant lands to B, to have and to hold to him and his heirs, provided that, or so as, or under this condition, that B do pay to A ten pounds at Easter next, this is a good condition, and the estate is conditional, without any more words." See further, on this point, 5 Vin. Abr. 47; Plow. 131; Rolls' Abr. Conditions, K; 5 Mass. 320; 3 Comyn's Dig. 86; 5 Serg. & Rawles, 385; 2 Bouv. Inst. 272–3; Bacon's Abr. Conditions. H.

3. But it insisted, that the instruction of the Circuit Court to the jury, that this was not a conditional deed, worked no injury to the plaintiff in error, because the bill of exceptions fails to show an entry for condition broken, or even that the condition was broken. This position cannot be sustained; for the rule is settled by numerous decisions of this court, that where an affirmative charge is given by the court, either of its own motion, or at the instance of the opposite party, and is excepted to, it is unnecessary to set out the evidence on which it is founded. Peden v. Moore, 1 Stew. & P. 71; Rowland v. Ladiga, 9 Por. 488; Kirksey v. Jones, 7 Ala. 623; Dukes v. Leowie, 3 ib. 459; Tharp v. The State, 15 ib. 479; Ware v. Dudley, 16 ib. 742.

The court is clearly put in error in respect of a most important point made in the cause—the construction of the deed; and if the plaintiff below desired to parry the effect of this erroneous construction, he should have caused the whole of the proof to be set forth in the bill of exceptions,

thus certifying to us that the charge was abstract, and had no necessary tendency to mislead, or that, by reason of something else, the charge was rendered innocuous. We cannot presume, from the silence of a bill of exceptions which does not purport to set out all the proof, that the erroneous affirmative charge was either abstract, or not injurious. 6 Ala. 226.

4. Although the deed from Kennedy to Duval contains no covenants of warranty as to title, yet it purports to convey the whole title, and recites the fact, that the title is, in anticipation, to be confirmed by the United States. It was so confirmed. Now, it may be, that William E. Kennedy, or those claiming under him, may have an equity superior to that of Duval. Of this, however, it does not become us to inquire, since this is a proceeding in a court of law, which looks alone to the legal title. As to this legal title, Joshua Kennedy is estopped by his deed from saying that it did not pass, and so, also, are his privies. It is manifest, from the deed itself, that the future confirmation was to operate an investiture of title in the purchaser. That an estoppel operates to pass the title, see 4 Kent, 98. We are, therefore, of the opinion, that the whole legal title vested in Duval upon the confirmation by the Government of Kennedy's title. If such were not the effect of the deed, it would present this singular and absurd contract, that Duval should pay interest yearly on the purchase money agreed to be paid for the land until the principal fell due, and this should fall due and be paid at the moment of time when it was ascertained the purchaser could never obtain what he purchased. The cases cited by the counsel for the defendant in error, clearly show that this deed, with possession taken under it, clearly estops the grantor.

5. As respects the proof of the deed from Kennedy to Duval, and the authority under which the attorney acted, it it is only necessary to recur to the rule, that a deed more than thirty years old, having nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead; and when it is found in the proper custody, and is corroborated by enjoyment under it, or by other equivalent explanatory proof, it is allowed to prove itself, or rather, its genuineness is presumed. Greenl. Ev.

§ 144; Phil. Ev. (C. & H.) note 903; Doe ex dem. Farmer's Heirs v. Eslava, 11 Ala. 1028.

The deed before us comes fully up to the requirements of the rule stated, and we think the court did not err in admitting the proof concerning its execution, as no injury resulted to the opposite party.

6. The acknowledgment of the deed from Duval to Getz is sufficient. True, it does not state that the deed was executed on the day it bears date; but this is rendered unnecessary, by the fact that the acknowledgment was on the same day on which the deed was executed, and this has been held sufficient. Bradford v. Dawson, 2 Ala. 207.

We have now noticed the material points which will probably arise upon a subsequent trial. The other minor objections, as to the quantum of preliminary proof to let in secondary evidence, we deem it unnecessary to notice, as, in all probability, they may be avoided, or the proof may present them differently upon another trial.

It follows, from what we have said, as to the conditional character of Kennedy's deed to Duval, that the judgment must be reversed, and the cause remanded.

BRYAN & McPHAIL *vs.* COWART.

1. A bill which alleges that the complainant had advanced money to one of the defendants, and also executed to him, for his accommodation and without consideration, a promissory note for a large amount, and had taken from him a deed to a house and lot, which was absolute on its face but intended as a mortgage for the security of the debt created by the loan of the money and the note, that said defendant had, without consideration, transferred said note to his co-defendant, who was cognizant of the facts attending its execution, and who afterwards recovered a judgment on it against complainant; and which asks, that the deed may be declared a mortgage, that the mortgage may be foreclosed, and that the judgment at law may be enjoined, is not wanting in equity, although its allegations as to complainant's failure to make his defence to the suit at law would not be sufficient to entitle him to relief against the judgment, if the bill were filed for that purpose only.
2. The grantee of a deed, which is absolute on its face, may come into a court of equity to have it declared a mortgage.

3. An agreement that a deed absolute on its face should operate only as a mortgage, must be contemporaneous with the execution of the deed itself; otherwise, unless supported by some new consideration, it is *nudum pactum*, and no right can arise under it.
4. In ascertaining whether an absolute deed was intended as a mortgage or a conditional sale, parol proof of the intention of the parties at the time of its execution may be received.
5. The proof must be clear and convincing, to enable the court to declare an absolute deed a mortgage. Loose declarations of a trust, especially after great lapse of time, will not be allowed to overturn or affect the written contract of the parties.
6. An answer which denies the allegations of the bill upon the knowledge of the respondent must prevail, unless it is disproved by the testimony of one witness with strong corroborating circumstances, or by two positive witnesses. These witnesses must not only be credible, but their opportunities of knowing the facts about which they depose must be ample.
7. When the complainant seeks to have an absolute deed declared a mortgage, and does not examine the subscribing witnesses to the deed, to prove what transpired at the time of its execution, the fair presumption is, that their testimony would militate against him; and such failure casts a shade of suspicion on his cause, which will induce the court to regard with more jealousy, and examine with stricter scrutiny, the less convincing proof on which he relies.
8. When the complainant fails to make out the only ground for relief which gives a court of equity jurisdiction of his case, his bill cannot be retained on account of other grounds of relief, even if the proof sustains them.

ERROR to the Chancery Court of Barbour.

Tried before the Hon. J. W. LESESNE.

William Cowart filed his bill in the Chancery Court of Barbour, against Moses Bryan and David McPhail, in which he alleges that, in 1838, Bryan applied to him to procure a loan of $500 for the defendant McPhail, who was Bryan's son-in-law; that complainant made the loan, and Bryan became security for McPhail; that about a year afterwards complainant made another loan, of $622, to McPhail, at the instance of Bryan: that, at the time of the last loan, complainant surrendered to McPhail the note for the previous loan, and with his consent it was cancelled: that, at the same time, it was agreed that Bryan should advance a sum equal to the two loans made by complainant to McPhail, and that both Bryan and complainant should each execute to McPhail his promissory note for $1,042 $\frac{1}{2}$, which was accordingly done; that at this time complainant and Bryan took from McPhail a deed for a certain house and lot in the town of

Eufaula, which is particularly described in the deed which is made a part of the bill; that this deed, though absolute on its face, was intended as a mortgage and a security for the money thus advanced; that the advancement was made to enable McPhail to complete the building, and the notes were given without any consideration, but merely to correspond with the amount stated in the deed as its consideration; that at the commencement of these transactions, he was wholly unacquainted with McPhail, and advanced the money at the instance of Bryan, whom he knew; that complainant never took possession of the premises, nor received the rents and profits, but that McPhail retained and held both; that Bryan never made any advance of money to McPhail, as he had agreed to do, nor does complainant believe that he ever paid his note for $\$1,042\frac{12}{100}$; but that said Bryan has retained constantly since both his own note and complainant's; that he now pretends to have obtained complainant's note by transfer from McPhail, and has brought suit on said note against complainant in the Circuit Court of Barbour, and recovered judgment; that complainant endeavored to prevent a recovery, by offering to prove the foregoing facts, but his defence was ruled out by the court; that execution has issued on the judgment, and is now in the hands of the sheriff: that Bryan and McPhail have wholly failed to repay the money advanced by complainant to McPhail.

The bill prays that the deed may be declared a mortgage, that the mortgage may be foreclosed, that the premises may be sold, and that the judgment may be enjoined; or, if the court should not hold the deed a mortgage, then he prays that McPhail may be made to account for the rents and profits, and that they may be applied to the satisfaction of Bryan's judgment against complainant.

The defendants filed separate answers. Bryan admits that Cowart advanced the $500 to McPhail at his instance. He also admits the payment by Cowart of the sum of $622, but he positively denies that it was intended as a loan to McPhail. He alleges that, at the time this payment was made, Cowart and himself purchased the house and lot from McPhail, and the $622 was paid by Cowart on this purchase; that the price of the lot was agreed on between the parties, one-half of

which Cowart agreed to pay, and the other half was to be paid by respondent; that at this time Cowart surrendered to McPhail said note for $500, paid the $622, and executed the note on which the judgment mentioned in the bill was founded; that at the same time respondent agreed to pay to McPhail, or to account with him for a like sum, which respondent did by crediting McPhail on advancements already made to him, and by giving his note for $500, which respondent has since paid; that thereupon McPhail made the deed to Cowart and respondent mentioned in said bill; that this deed was never designed as a mortgage, but was intended to be, what on its face it purports to be, an absolute deed of bargain and sale; that he has long since paid to McPhail his portion of the purchase money, and is the owner, for valuable consideration, of the note on which the judgment is founded. He admits that McPhail has kept possession of the house, but alleges that he did so as the agent of Cowart.

McPhail admits that he borrowed the $500 as charged, and that he afterwards received from Cowart $622; but denies that it was as an additional loan to enable him to finish his house, and alleges that it was paid as a part of the purchase money of the house and lot mentioned in the deed, and was paid contemporaneously with the making of the deed, and with the cancellation of the $500 note. He also denies that the deed was intended as a mortgage, and insists that it was an absolute deed of conveyance, and that such was the intention of all the parties. He admits that Cowart then made the note on which judgment was rendered, but denies that it was made without consideration, or for the mere purpose of corresponding with the amount named in the deed; but, on the contrary, asserts that it was for the balance of Cowart's portion of the purchase money for the house and lot according to the agreement between them; denies that Bryan has not paid his portion of the purchase money according to his contract; alleges that he owed Bryan all that the latter was to pay, except $500, for which Bryan executed to him his note, which he has since paid in full; that some time after Cowart's note was delivered to respondent, he sold it to Bryan, who paid him the full amount of it. He disclaims all interest in the judgment, and denies all fraud. He alleges that he

was in possession of two rooms in the house as tenant for Cowart & Bryan, and of the remainder of the house as their agent, in which latter character he rented the rooms to others, and received the rents, for all which he is ready and willing to account.

After the testimony was taken, the bill was amended, by making a fuller averment of an attempt to defend the suit at law, and alleging McPhail's insolvency. The consideration for the making of the deed, as expressed on its face, is $\$4,399\frac{21}{100}$. The subscribing witness to it are James McNabb and James Gresham.

Jacob Nelson, the first witness in behalf of complainant, whose deposition appears in the record, testifies that Bryan told him in 1842, that Cowart and himself had kept McPhail's house from being sold, and that they held the house in their own names; and in another conversation, when Bryan was complaining of Cowart, he told witness that he held Cowart's note for $1,040, and when asked why he did not sue on it, replied, that there was a secret about the note, that he could not sue on it, that it was given about the time McPhail failed. This witness was not cross-examined by the defendants.

L. C. Harrison, another witness for complainant, testifies that Cowart handed him a note on Bryan, does not recollect the time, but his impression is that it was in 1843, in payment of a debt due witness; does not recollect who was the payee of the note; it was paid, and the proceeds applied to Cowart's credit; does not know who paid it; has no recollection of any conversation with B. concerning it; the whole business was attended to by his book-keeper.

McIntyre, another witness for complainant, testifies that McPhail told him, in June, 1841, that he was paying interest on $2,200, which Cowart and Bryan had advanced for him on the brick-house in Irwinton, and that the rent of the house would soon pay it; that Cowart and Bryan held a mortgage on the house. Witness further says, that at various times he heard McPhail say—that he was renting the house at from $10 to $12 per month; that in March, 1842, Bryan told witness he was owing Cowart borrowed money, and having taken Cowart's notes to one Roberts he was short of money, and could not pay witness what he owed him.

G. C. Hodges, another one of complainant's witnesses, deposes that he met Bryan in 1846, at Columbus, Ga., when a conversation took place between them about the note; witness observing that it was wrong for old neighbors to fall out, alluding to Bryan and Cowart, Bryan replied, that if Cowart had not attempted to keep John E. P. Cowart's property back, the note should never have come against him.

Robert Hill, another one of complainant's witnesses, deposes that, in 1843, he was present when Bryan and the Cowarts had an interview at Bryan's shop; they met, as witness understood, to make friends; Bryan and complainant shook hands at parting; witness did not hear what passed between them, but, after the Cowarts left, Bryan told him that they had made friends, and when he (B.) had destroyed a note in his possession, which he would do that evening, everything would be settled between him and complainant; in 1842, or early in 1843, witness had heard Bryan speak of having borrowed money from Cowart.

M. A. Browder, for complainant, testifies that, in the spring or fall of 1838, Bryan applied to him for a loan of money, for the purpose of relieving McPhail's house from the debt for building it, Bryan expressing his apprehensions that it would be sold; witness could not let him have the money; a few months afterwards, witness asked Bryan whether he had arranged that business for McPhail, and Bryan answered that he had got the money from Cowart, and saved the property, and witness thinks he said that he had taken the title in his own name.

J. Buford, for complainant, testifies that, from 1838 to 1843, he alone, and himself and partner, rented a room in the house in controversy; that he rented of McPhail, and when making payments took receipts signed by McPhail, which are appended to his deposition; McPhail seemed to have the sole control of the property during those years; witness thinks that in settling his last account he paid a part in a note on Bryan.

John McNabb, one of defendants' witnesses, testifies, that in the latter part of 1838 or in 1839, Bryan deposited $1,600 or $1,700 with witness and his brothers, with instructions to pay it over to McPhail, which was accordingly done: a part

of it was used to pay workmen on the building; after this Bryan drew $400 or $500 from the Bank at Montgomery, and from this source McPhail received money, but witness does not state how much. This witness was cross-examined, but his testimony remains the same in effect.

Geo. W. Thomas, for defendants, deposes, that in 1845 he went to complainant, for the purpose of renting a room in the house mentioned in the bill, when complainant referred him to McPhail, saying that he (McP.) was his agent to rent out the house; witness then went to McPhail, who rented him the house as agent of complainant.

Stow, a witness for complainant, deposes, that McPhail occupied and rented the house in dispute, from 1840 to 1846 or 1847, when he abandoned it, after the judgment at law was obtained against Cowart; supposes that McPhail received the rents; knows that he received the rent for one year of one room which was used by the Town Council; witness estimates the rents, and values the lot and building in 1839–40 at $2,500; says that the value of the property rapidly declined after 1840.

T. Robison, a witness for defendant, testifies, that he has known the premises since the house was built; that they were occupied by McPhail and others until the spring of 1847, when he abandoned them; in 1839 the building and lot was worth $4,000, but has been steadily declining in value; that the rents in 1839 and 1840 were worth $700 each year; in 1841 and 1842, half that sum; and steadily declined; when McPhail abandoned the premises, they were not worth more than $300, and the annual rents $50.

At the hearing, a motion was made to dismiss the bill for want of equity, which was overruled. Upon the state of facts above set forth, the Chancellor declared the deed a mortgage, decreed a foreclosure of the mortgage, and a perpetual injunction to the judgment at law, and directed the Master to state an account, &c.; and all these things are now assigned for error.

COCHRAN and S. F. RICE, for plaintiffs in error:

1. A collateral writing (the deed) does not exclude oral evidence, to show the consideration or want of consideration

in the note sued on. If the complainant ever had any remedy against the note, that remedy was in the court of law. 1 Starkie on Ev. 394, § 16; Laroque v. Russel, 7 Ala. 798; Bates v. Terrell, 7 Ala. 129; 1 U. S. Dig. (Supplement) 731 to 733.

2. The judgment at law is conclusive of every fact and question which might have been tried there; such as the question, whether, at the date of the note and deed, McPhail was indebted to Cowart, or Cowart to McPhail, &c.

3. Where the plaintiff's own witness proves that he is not entitled to sue in Chancery, although the evidence is not pertinent to the issue, the court is bound to notice it. A law court will do so, and of course Chancery will. Chancery always looks to see whether complainant's hands are clean, and whether he ought to have its active aid. Susan v. Wells, 3 Brevard's Rep. 11.

4. Whenever, in proving or attempting to prove his right to relief, the complainant proves that the transaction out of which his case arises, is part of a scheme to defraud the creditors of a known insolvent, the Court of Chancery cannot soil its hands by becoming the agent or minister of either party to such fraud, to consummate their unlawful agreements.

5. Chancery has no jurisdiction of the case made by the bill. But if it has, the case made by the bill is not sustained by proof against the responsive denials of the answers.

BUFORD, *contra:*

1. As to jurisdiction: at law, a deed cannot be explained as a mortgage, 12 Ala. 678; 8 Conn. 189; 4 Mass. 443; 2 Sumner, 527; 13 Mass. 446, even when the question arises collaterally, and between strangers to it. 8 Conn. 121; 7 ib. 143; ib. 409; 3 Phil. on Ev. 1422, 1431–5, note 961; 2 Am. Chan. Digest 180–6; 5 Smedes & M. 91; 14 Ala. 218; 2 Conn. 481; 6 ib. 653; 5 Stew. & P. 67; 4 ib. 116; 1 Ala. 438; 3 Johns. 508. But in equity, an absolute deed may be explained to be a mortgage. 14 Ala. 221. If the transaction was intended as a security, the form is immaterial. 2 Sumner, 533; 5 Paige, 9; 2 J. J. Mar. 471; 1 Johns. Ch. R. 594; Dev. Eq. R. 373; 12 Mass. 456; 6 Monroe, 120; 3 J. J. Mar. 354. The grantee may treat the deed as a mortgage,

and apply for a foreclosure. 9 Wheat. 489; 5 U. S. Con. R. 648.

Though a party may defend on one ground at law, yet if equity has jurisdiction on another ground, he may go into equity after a judgment at law. 13 Ala. 200; 8 ib. 35; 1 Am. Chan. Digest 348. As to the foreclosure the jurisdiction is clear, and the right to enjoin the judgment at law, or to order the money to be refunded if paid, follows as an incident. Bryan, being cognizant of all the facts, has no better equity than McPhail; and it seems, when the note constitutes the over-payment, money may be recovered back, even at law, though paid on judgment. 11 Mass. 66. But suppose the foreclosure and injunction were independent, rather than incidental causes of action, yet as they grew out of the same transaction, cognizance of one branch draws after it jurisdiction of the other. Story's Eq. Pl. §§ 283, 284; 1 Story's Equity § 68, 73. And where the remedy is more complete in chancery, jurisdiction attaches. 4 Howard (Miss.) 455; 6 Ala. 24.

The attempt of Bryan and McPhail to treat the note as binding is "using it against the intent of the parties," and is such a fraud as gives equity jurisdiction. 14 Ala. 220. Cowart could not defeat the note, without showing the deed to be a mortgage, which he could not do at law; and the suit at law was making that court an instrument of injustice, where equity will interpose. Story's Eq. Pl. 472.

II. As to the evidences of the deed being a mortgage: The vendor remained in possession. 2 Sumner 536; 3 Powell on Mortgages 1090. The transaction began by the proposition to borrow money. 2 U. S. Con. R. 481. The relation of debtor and creditor existed. 7 Ala. 724. Bryan and McPhail both admit in their answers that Cowart's note was never in McPhail's hands. Bryan did not advance his portion of the cash, as per agreement. Both answers admit a deficit of $500. Where the *onus* is on the defendant, his answer to a negative allegation is no proof. 6 Ala. 718. McPhail states Bryan's advance to have been partly made prior to the purchase. A failure to take note is not conclusive of sale. 12 Ala. 678; 16 ib. 472. Several witnesses testify to facts showing that the deed was treated as a mort-

gage by the parties. And this evidence is sufficient to outweigh the answers, though positive, clear, precise and definite. Greenl. § 260; 2 Peters U. S. Digest 258, §§ 11, 35.

LIGON, J.—The Chancellor did not err in refusing to dismiss the bill for want of equity. In its form, structure and matter, it is not alone a bill to enjoin a judgment at law; but it contains allegations on which it seeks relief, that could only be sought in, and extended by a court of equity. On this motion all the allegations of the bill are admitted to be true. These assert, in terms or effect, that the deed from McPhail to Cowart and Bryan, though absolute on its face, was intended by the parties to operate as a mortgage, and one object of the bill is to have it so declared, and to obtain a decree of foreclosure. A court of equity is the only forum which can hear and determine such matters, and having jurisdiction for this purpose, it may rightly take it for the purpose of doing complete justice between the parties; and, if, to accomplish this end, and to prevent oppression and injustice, an injunction was necessary, it would not hesitate to grant one.

This case is wholly different, when viewed in all its aspects, from that large class of cases to which we are cited by the counsel for the plaintiffs in error, and which determine the rules that govern the conduct of the Chancellor, in granting injunctions to judgments at law, for the purpose of enabling the defendant to wage, in equity, a legal defence, which he had been prevented from setting up on the trial at law by fraud, or accident, or the act of the opposite party, unmixed with any fault or negligence of his own.

But it is contended, that the right to come into a court of equity, for the purpose of showing that a deed, absolute on face, was intended to operate only as a mortgage, is confined exclusively to the grantor. That such is the character of nearly all the cases with which the books abound, I readily admit, and this, for the obvious reason, that in such transactions the hardships, if any exist, generally fall on the grantor. But I can see no good reason why the grantee, if he desires to do so, may not become the actor. The agreement by which the absolute terms of the deed are to be controlled, is mutual, and to deny either party the right of seeking to enforce it would destroy that mutuality.

Again, it is not uncommon for men to lend money on securities, of which they do not wish to become the permanent owners. They may be ample to indemnify, and exceed in value the sum advanced upon them, still, the lender may not desire to make a permanent investment in them; and I know no rule of law which will authorize the borrower to force him to do so, contrary to their agreement, and such would be the effect of the rule contended for. Such securities may depreciate in value, and though once sufficient, they may, by the fluctuations of trade, become wholly inadequate as an indemnity before the law day of the mortgage arrives. The loss thus resulting should not be thrown on the lender, when he had protected himself against it by the terms of his agreement with the borrower; and unless he is allowed to become the actor, such would be the inevitable result. In nearly all cases of loans upon mortgage securities, or securities in the nature of a mortgage, the object of the lender is to make a profit by the use of his money, and when, by his agreement, he becomes the holder of the legal estate in the thing transferred, and engrafts upon it a secret trust in favor of the borrower, there is no rule of law, within my knowledge, which denies him the right, after the time agreed on for the repayment of the money has passed, to come into a court of chancery to foreclose the borrower's equity of redemption, and discharge himself from the responsibilities of the trust.

In the case under consideration, no other conclusion can be drawn from the allegations of the bill, than, that Cowart was willing to loan his money on the security of the house and lot, but that he was unwilling to invest it permanently in such property. On this state of facts, he has a clear and unquestionable right to appeal to a court of chancery to establish his agreement, and when he makes out his case, by sufficient proof, to foreclose the deed as a mortgage, and to discharge himself from the trust in favor of McPhail. The latter will not be allowed, in fraud of his agreement, to make him the unwilling owner of an estate, which he neither agreed to purchase nor desired to own; and to change his own character from that of an obliged money-borrower, to that of a vendor of real estate who has only received his purchase money. Yet such would be the effect of allowing the motion to dismiss, for the cause last examined.

2. We will next examine whether the case made by the bill is sustained by the pleadings and proof.

Before, however, we enter upon an examination of the facts, let us advert to such of the general rules of law, as, by the almost universal judgment of the courts, govern in cases in which an absolute deed is set up as a mortgage. In Freeman v. Baldwin, 13 Ala. 246, in which an absolute bill of sale, accompanied by a defeasance, formed the basis of the litigation, this court held, that the deed and defeasance must be shown to be contemporaneous acts, so as to form one transaction, one agreement. See also, 2 John. Chy. Rep. 189; 2 Greenleaf's Rep. 152; 12 Mass. 456. If the deed be made at one time, and the defeasance at another, and the latter is unsupported by any new consideration, it is *nudum pactum*, and no rights can arise under it.

Another rule is, that, in ascertaining whether an absolute deed was intended as a mortgage or a conditional sale, parol proof of the intention of the parties at the time of its execution may be received. Hudson v. Isbell, 5 S. & P. 67; English v. Lane, 1 Por. 328; Turnipseed v. Cunningham, 16 A. R. 501.

It is also held, that to enable the court to declare an absolute deed to be a mortgage, the proof must be clear and convincing. Loose declarations of trust, especially after great lapse of time, will not be allowed to overturn, or affect the written contract of the parties. Freeman v. Baldwin, *supra*.

In referring to the authorities to sustain the rules above laid down, I have confined myself mainly to those which are found in our own court: an extensive examination, however, of those to be found in the decisions of other courts, has satisfied my mind that they may be considered, as of general, if not of universal application, where trusts of this kind are allowed to be set up against the express terms of a deed.

Let us apply them to the case under consideration, and by their direction, aided by such other rules of law and practice as must control the case, examine the complainant's right to the relief he seeks by his bill.

The answers of both the defendants deny, in express terms, that the deed was ever intended as a mortgage. It is a familiar rule in chancery proceedings, that where the answer de-

nies the allegations of the bill, upon the knowledge of the respondent, it must prevail, unless it is disproved by the testimony of one witness, with strong corroborating circumstances, or two positive witnesses. These witnesses must not only be credible, but their opportunities of knowing the facts about which they depose must be ample. And in cases like the present, those facts must be shown to have existed at the time the deed was made, so as to render them contemporaneous with its execution, and a part of the agreement out of which it sprung. To persons present when the deed was made, and who became subscribing witnesses, we would most reasonably look for an intelligent and truthful account of what occurred at the time of its execution. When there are such persons in existence, and they are not produced to prove what transpired when it was made, the fair presumption is, that their testimony would militate against him whose case they could sustain or destroy. This failure alone, in the eye of the law, casts a shade of suspicion over the cause of the complainant, and will induce the court to regard with more jealousy, and examine with stricter scrutiny, the less convincing proof on which he relies. To this deed there are two subscribing witnesses, and no reason is given why their testimony was not produced at the hearing.

We must, then, resort to the deed itself, and the answers of the two defendants, as the best exponents of the intention of the parties. These correspond perfectly with each other, and directly contradict the allegations of the bill. All the witnesses who testify of conversations with the defendants to the bill, with the exception of Browder, speak of conversations which occurred from two to four years after the transaction, and it may be remarked, that none of these conversations appears to have been held under such circumstances as would entitle them to any grave consideration, or with persons to whom it would be likely the parties would make a very free communication of their private affairs. I say this, because none of the witnesses testify that the relations between themselves and the party with whom they conversed, amounted to more than ordinary acquaintanceship; nor do they show that they were creditors, who were inquiring into the condition of their debtor, and upon whose memories all

that was said upon the subject of property, would be likely to impress itself deeply. These conversations, then, and the admissions contained in them, may be regarded as little, if indeed they amount to any thing, more than loose declarations of the party making them; and certainly they do not rise to the dignity of that clear and convincing parol proof which is allowed to control the written contract of the parties.

Nelson, the first witness examined in behalf of the complainant, deposes, that, "in 1842," (four years after the deed was made,) "he heard Bryan say, that he and Cowart had kept McPhail's house from being sold, and that they held the house in their own names." McIntyre says, that "in June, 1841, (more than three years after the date of the deed,) McPhail told him, he was paying interest on $2,200, which Cowart and Bryan had advanced for him on the brick house in Irwinton, and that the rent of the house would soon pay it up; that Cowart and Bryan had a mortgage on the house." Browder says, that, "in the spring of 1838," (the deed is dated in February of this year,) "Bryan applied to him to borrow money for McPhail; that he had none to lend at that time; and a few months afterwards, Bryan, in reply to a question asked by witness, told him that he had got the money from Cowart, and had saved McPhail's property, and witness thinks, he said, he had taken the title in his own name." These are all the admissions of Bryan and McPhail, relied on by the defendant in error, to show that the deed was intended as a mortgage. To this may be added the fact, that McPhail lived in the house himself, and rented some of the rooms to others, from whom he received the rent; and the further fact, that Bryan did not sue on the note for nearly six years, and at one time said, "there was a secret about it," and at another declared "that he and Cowart had made friends, and when he destroyed a note which he held on Cowart, which he intended to do that evening, every thing would be right." But little importance can be attached to the fact of McPhail's possessing and renting the premises, when we read the deposition of the witness Thomas, who says, that, in 1845, he went to Cowart to rent one of the rooms of the house, when Cowart told him that McPhail was his agent to rent the house, to whom witness applied, and from whom, as such agent, he

rented the room he desired. The declarations of Bryan are too enigmatical and uncertain to entitle them to much weight. From the former, it would be rashness to infer that the "secret" could only relate to the existence of the trust in him and Cowart, in favor of McPhail; and the latter may as well point to the note of Cowart, which he paid to Roberts, as to the note in dispute. These things give but little strength to the insufficient proof before recited.

Allow to the proof of the defendant in error all the force to which it is entitled, it does not equal the testimony of one positive witness, who knew the agreement between the parties; and yet, under the rule of evidence which we have cited as governing this case, the testimony of such a witness would not prevail against the answers, unless aided by pregnant circumstances, or the proof of another witness.

From this review of the facts and law of the case, it is clear, the decree of the Chancellor on this branch of the case cannot be sustained.

All the other defences urged in the argument against the collection of the note on which the judgment is founded, are of a character purely legal, and as the defendant in error has failed to make out the only ground for relief which gave a court of equity jurisdiction of his case, the bill cannot be retained on account of the other grounds of relief, even if the proof sustained them; which, in our opinion, is not the case.

It only remains to add, that the decree of the Chancellor is reversed, and decree is here rendered dismissing the bill, at the cost of the defendant in error, both in this court, and the court below.

HOLT *vs.* ROBINSON.

1. Any act of the plaintiff, from which he may sustain any detriment or inconvenience, or from which the defendant derives a benefit, is a sufficient consideration to support a promise.
2. Where a sheriff, having an execution in his hands, is referred by the defendant

to a third person, from whom in settlement of it he takes his promissory note for the amount, and then returns the execution satisfied, the plaintiff may have the return set aside, as prejudicial to his rights; but the sheriff himself is bound by it, and can neither amend nor set it aside.

3. And in such case, a promissory note afterwards executed to the sheriff by the executor of the defendant, in consideration that the sheriff should not set aside or amend his return, and should pay the judgment himself, is without any legal consideration to support it.

4. Nor does the circumstance that the executor, at the time of the execution of his note, had a full knowledge of all the facts, in any manner affect the validity of the note.

5. The consideration of a note may be inquired into and impeached without a sworn plea.

ERROR to the Circuit Court of Barbour.

Tried before the Hon. ROBERT DOUGHERTY.

Assumpsit by Robinson against Holt on a promissory note. All the facts of the case are set out in the opinion.

COCHRAN & SAYRE, for plaintiff in error:

1. The note originally executed by Jernegan to Robinson is void. A promise made to an officer, as a sheriff, for the omission of a duty, which he is bound to perform, is void. Hodson v. Wilkins, 7 Greenl. 113; 2 Johns. 193; Story on Con. 569; Ayer v. Hutchins, 4 Mass. 370; Churchill v. Perkins, 5 ib. 541; 1 Southard, 319; Webber's Exr. v. Blount, 19 Wend. 190; 5 Mass. 385; Bobo et al. v. Thompson, 3 S. & P. 387.

2. The note executed by Holt to Robinson was void, because it was connected with, and immediately grew out of the original void contract between Jernegan and Robinson. 11 Wheat. 271.

3. The note given by Holt was to indemnify Robinson for a past neglect of duty, and, therefore, void. Story on Prom. Notes, 207, § 189; Story on Con. 505, § 575.

4. The note executed by Holt was without consideration. Thompson v. Hall, 16 Ala. 209; Beall & Co. v. Ridgway, 18 ib. 118.

5. The note was obtained by fraud, and, therefore, void. Dunklin v. Wilkins, 5 Ala. 200; 13 Wend. 570; Drake v. Moore, 18 Ala. 598; Read v. Walker, 18 ib. 332; Monroe v. Pritchett, 16 ib. 785; Story on Con. 421, §506.

A compromise induced by a false representation is not binding. Wellborn et al. v. Tiller, 10 Ala. 313.

6. The return of the sheriff proved that the execution was paid, and he cannot contradict his return. 2 Murphy, 255; 4 Ark. 185; Watson on Sheriffs, 53: 6 Ala. 254; Baker v. McDuffie, 23 Wend. 289; Williams v. Opett, 1 Smedes & M. 560; Planter's Bank v. Walker, 5 ib. 421; Van Campen v. Snyder, 3 How. 66.

7. Parties relieved where contracts made under a mistake. 5 Hump. 539, 43–4.

8. The testimony should have been excluded, for the reason, that by it the defendant in error was attempting to contradict his return as deputy sheriff. Governor, use, &c. v. Bancroft, 16 Ala. 605; Cook & Lamkin v. Bloodgood, 7 ib. 685.

9. The note executed by Holt was to pay the debt of another, for which he was not liable, and must be founded on a valuable consideration. Click v. McAfee, 7 Por. 75. The note is void for want of consideration. Rogers v. Waters, 2 Gill. & Johns. 73. The agreement on Robinson's part was not binding on him.

BUFORD, *contra:*

1. The consideration of the note could not be inquired into under the pleadings in this case. It could only be attacked by sworn plea. Clay's Dig. 340; Parkman & Stringfellow v. Ely, 5 Ala. 346; Young v. Foster, 7 Por. 420; Watkins v. Canterbury, 4 ib. 415; Selma R. R. Co. v. Tipton, 5 ib. 787; Nesbit v. Bradford, 6 ib. 746; Thompson v. Hall, 16 ib. 204; Click v. McAfee, 7 Por. 62; Holman v. Crane, 16 Ala. 570; Holman's Heirs v. Bank of Norfolk, 12 Ala. 370; Thompson v. Armstrong, 5 ib. 383; 5 Por. 154; 4 ib. 515.

2. The sheriff would have been allowed to amend his return. Amendments have been allowed, pending rules against the sheriff. Hodges v. Land, 10 Ala. 678; Lavender v. Lee, 14 ib. 693; Governor v. Bancroft, 16 ib. 613. And the parties themselves may reform mistakes, without the intervention of a court. Ib.

3. Money paid on a compromise cannot be recovered back, though none was due. Nabors v. Camp, 14 Ala. 460. For-

bearing color of suit is a good consideration. Pow. on Cyn. 214. Any inconvenience to promisee is a good consideration. Keenan v. Holloway, 16 Ala. 58. The sheriff may recover, where the defendant in the process imposes insufficient bail, and promises, before and after payment by the sheriff, (who was ruled for the insufficiency,) to indemnify him. Sewall on Sheriffs, 46 Law Lib. 309.

GOLDTHWAITE. J.—The circumstances under which the note sued on was given, were as follows: Robinson, the deputy sheriff, held an execution against William Holt, which he had returned satisfied, on receiving from one Jernegan, who had money in his hands belonging to said Holt, and to whom he had been referred for a settlement, the amount due on the execution. He also gave to Jernegan a receipt, to the effect, that he had, by him, received of the defendant in execution the amount of the debt, costs, &c. Some time after this, William Holt died, and his son, the present defendant, being his executor, settled with Jernegan, and on the production of the execution, with the return endorsed, and the receipt for the amount specified therein, paid him a small balance. After this, Jernegan died, wholly insolvent, and on the fact being communicated by the plaintiff to the defendant, that the note of Jernegan was all that had been received in satisfaction of the execution, and upon the representation and legal opinion of an attorney, that the return of satisfaction could be set aside by the sheriff, and an execution issued, he executed his note for the amount of the judgment, on the consideration that the deputy sheriff was not to have the return set aside, and was to pay the execution, and the note of Jernegan was endorsed to him by the plaintiff, without recourse. Upon this state of facts, the court charged, "that if the execution had been satisfied in no other way than by the note of Jernegan, and the note sued on was given by the defendant with a full knowledge of that fact, and on condition that the plaintiff should not make an effort to amend his return on the execution, the consideration was sufficient to support the note."

It will be observed, that the transfer of the note of Jernegan to the defendant was not referred to as constituting any

portion of the consideration, and, indeed, the evidence shows that neither party attached any value to it; so that the only question presented for the determination of this court upon the charge, is, as to the correctness of the legal proposition asserted in relation to the consideration of the note.

The rule is, that any act of the plaintiff, from which the defendant derives a benefit, or from which the plaintiff may sustain any detriment or inconvenience, is a sufficient consideration to support a promise. Testing it by this rule, we think it clear, upon the facts as stated in the record, that the note had no consideration to support it. The plaintiff, in the performance of his official duties, instead of collecting the money, chose to receive in its place, from the person to whom he had been referred for the settlement of the execution, his note, and to return the execution satisfied. Now, although the plaintiff in the execution could have set aside this return, as prejudicial to his rights, it is clear that the sheriff could not have done so. Conceding that the sheriff may amend his return in cases of mistake or fraud, in this case there was neither the one nor the other. He had elected to receive the note as money, and had, upon his official oath, made his return, acknowledging that he had received the amount of the execution, and, on his own motion, he would not be allowed to falsify this return. So far as he was concerned, he could look only to that which he had voluntarily elected to receive as satisfaction. Reed v. Pruyn & Staats, 7 Johns. 425. The injury which might result from the adoption of a different rule, is strikingly illustrated in the case which we are considering. The executor of the defendant in the execution, on the production of the receipt given by the sheriff, and the execution with the return of satisfaction endorsed, settled with the person whose note had been taken, as if he had actually paid the money; and after this had been done, when the return had been acted on, and by the death and insolvency of the party whose note had been accepted by the officer in satisfaction of the execution, all recourse upon him has been rendered unavailing, it could not be allowed, that, by setting aside his return, the sheriff should avert the consequences of his own act from himself, and throw them on an innocent party. Upon the facts, as disclosed by the

bill of exceptions, the return could not have been set aside or amended by the sheriff.

That the officer agreed to pay the judgment, does not place him in a better condition. We have already shown that the receipt of the note first taken by him was a satisfaction of the execution, as to all but the plaintiff in the judgment. On his motion, alone, could the return have been set aside; and as between the sheriff and the defendant in execution, the former was bound to pay the amount according to his return. It follows, that if the officer was legally bound to pay the amount of the execution, and could neither have set aside nor amended his return, he has received no detriment. He has sustained no legal injury from his engagement not to do the one or to do the other, and the defendant has derived no legal benefit. This principle is fully sustained by authority. It may be conceded, that where the consideration is the settlement of a doubtful claim, it is sufficient to sustain a promise. Longridge et al. v. Dorville, 5 B. & Ald. 117; Russell v. Cook, 3 Hill N. Y. 504. But where it is clear that there is no liability, there is no consideration; thus, the forbearance to sue, where the party is not liable, is not a good consideration. Cro. Eliz. 208; Yelverton, 25; Bayley, J., in Longridge et al. v. Dorville, *supra*. So, an action does not lie, if a party promise in consideration of a surrender of a lease at will, for the lessor might determine it, unless there was a doubt if it was a lease for will or for years. Com. Dig. title, Action on the Case, Assumpsit, F. 8.

Neither does the circumstance, that the defendant executed the note with a full knowledge of all the facts, affect, in any manner, its validity. The question presented by the charge, is solely as to the consideration; and if the evidence shows that the note was without consideration, it could derive no support from the fact that it was made with a full knowledge of the circumstances. It follows, therefore, that the charge of the court was erroneous.

It is, however, insisted by the counsel for the defendant in error, that as the consideration of the note was not impeached by a sworn plea, it could not have been inquired into. There was no alteration of the rule of law, as respects the consideration of promissory notes, by

the statute. Clay's Dig. 340. They imported a consideration: not so with other writings, in which the consideration is required to be proved. The object of the statute was simply to dispense with proof of the consideration in written instruments, by making the instrument itself *prima facie* evidence of the debt or duty which it imports to be given for. Greene v. Foster, 7 Por. 420; Holman's Heirs v. Bank of Norfolk, 12 Ala. 369. None of the decisions, however, go to the extent, that unless the plea is sworn to, the consideration cannot be inquired into, and the statute referred to only requires a sworn plea to put in issue the execution of the instrument, but not its consideration.

The decision of the court on these points, renders it unnecessary to refer to the other questions presented.

The judgment is reversed, and the cause remanded.

GAFFNEY *vs.* WILLIAMSON'S ADM'R.

1. When a claim against an insolvent estate is filed within six months after the rendition of the decree of insolvency, all objections to its allowance on final settlement must be filed in writing, by the administrator or some creditor, within three months after the expiration of the time allowed for filing claims; or, in other words, within nine months from the date of the decree of insolvency.
2. When a claim is filed in time, but not verified by affidavit, and an objection to it in writing, because it is not so verified, is filed in time, the affidavit may be supplied at any time before, or at the day set for final settlement of the estate.
3. Yet if a claim is filed in time, and not verified by affidavit, and no objection to its allowance is filed in time, then no objection against its allowance can be heard on final settlement, for an insufficient verification by affidavit, the want of an affidavit, or any other cause.
4. The objection that a claim was not filed in time may be raised by the administrator or any creditor, even at the hearing.
5. When a claim against an insolvent estate is filed on the same day on which the decree of insolvency is rendered, the Appellate Court will presume, in the absence of other proof, that it was filed *after* the rendition of the decree.

ERROR to the Court of Probate of Talladega.

The estate of Thomas Williamson, deceased, was declared insolvent, by the Orphans' Court of Talladega, on the 28th

April, 1845. Upon the final settlement of said estate, on the 18th July, 1846, Gaffney, the plaintiff in error, presented for allowance a promissory note, of which the following is a copy:

"On or before the first of March next, we or either of us promise to pay Michael Gaffney, or bearer, the sum of sixteen hundred dollars, for value received. August 25, 1836."

his
(Signed) THOMAS ✕ WILLIAMSON, [Seal.]
mark.
DANIEL MILLER, [Seal.]

Test: S. WELDS VERNON.

This claim had been prepared for presentation to the administrator, in the following manner: A literal copy of the note, with the names of the makers and the attesting witness, had been made out in writing; beneath this was an affidavit, purporting to have been made by the payee, M. Gaffney, of which the following is a copy:

"South Carolina, } Personally appeared before me Mi-
Spartanburg District. } chael Gaffney, and makes oath that the estate of Thomas Williamson, deceased, is justly indebted to him in the sum of sixteen hundred dollars, with interest from the first day of March, A. D. 1837, as will be seen by the above copy note, and that no part of the same has been paid, and that he doth not in any wise stand indebted to the said Thomas Williamson's estate.

"MICHAEL GAFFNEY."

Sworn to before me, Sept. 27, 1842,
H. G. GAFFNEY, (Mag.)"

To this is subjoined a certificate under the seal of the court, by Joshua Tapp, who describes himself as clerk of the Court of Sessions and Common Pleas, for Spartanburg District, that H. G. Gaffney, before whom said affidavit was made, was an acting magistrate for said District at the date of said attestation, that his signature to the same is genuine, and that his official acts are entitled to credit. This certificate is dated September 28, 1842.

The official character of this clerk is next attested, by the certificate of B. J. Earle, as presiding judge of said court. Upon the whole is written the following memorandum, by the clerk of the Orphans' Court of Talladega: "Left on file in

my office, 28th April, 1845. A. J. Cotten, clerk." On the original note was also written the same memorandum: "Left on file in my office, 28th April, 1845. A. J. Cotten, clerk."

On the 18th July, 1846, objections in writing were filed to the allowance of this claim: 1. That it was not filed within six months after said estate was decreed insolvent; 2. That it was not properly verified by the affidavit of the claimant or any other person. A trial was had before the Orphans' Court on these objections, on the 18th July, 1846, and the claim was rejected. This decree was afterwards reversed by the Supreme Court. See 12 Ala., 628.

At a day subsequently set, viz: February 16th, 1850, for the final settlement of said estate, before the Court of Probate of Talladega, the same note, with the same affidavit appended, was again offered for allowance, and the administrator again made several objections to it. These objections amount in substance to but two: that the claim was not properly verified by affidavit, and that it was not just. Gaffney's counsel, in the language of the record, "asked the court to reject said objections, and to allow said claim, on the ground that said objections were not filed within the proper time; and the court overruled said motion." The objections were then considered, and the claim was rejected, as not being sustained by proper or legal proof. The decision of the questions involved in the contest was, by consent, submitted to the judge alone, without the intervention of a jury.

The errors assigned are:

1. The rejection of the claim by the court;

2. The refusal of the court to reject the objections, as not being filed within three months after the claim was filed;

3. The record shows that the original note was offered, which was, of itself, sufficient "proper and legal evidence" of the claim;

4. The judgment shows that it was rendered upon a ground which could not have been involved in any issue on the objections filed by the administrator.

J. T. Morgan and Woodward, for plaintiff in error:

1. In Gaffney v. Williamson, 12 Ala., 628, it was decided that this claim was properly filed; and the same objections

were made then as are now made to its allowance. If the objections then made were good, the case should not and would not have been reversed.

2. The case of Hollinger v. Holley, 8 Ala., 454, settles, that the objection to the allowance of the claim must be made in the time and in the mode specified in the act of 1843. If not so made, the claimant is under no compulsion to make an affidavit; it is waived, by the omission to take exception to it. No objection was made in this case within nine months after the estate was declared insolvent. Hogan v. Calvert's Adm'r, and Bartol v. Calvert's Adm'r, at the present term.

3. Brown v. Easly, 10 Ala., 566, is conclusive of this whole case. It shows that an affidavit to the claim is only necessary upon an objection being made within the time prescribed by law.

4. The affidavit is not required in order to prove the claim, but as a test of its justness. The note in this case proves itself, just as if it were sued upon; for the proceeding in cases of contested claims against insolvent estates is assimilated to a suit upon the demand, and must be followed by all the consequences of a suit directly upon the note. Holman's Heirs v. Bank of Norfolk, 12 Ala., 369.

S. F. RICE, *contra:*

The act of 1843 provides, that "every person having any claim against such insolvent estate, shall file the same in the clerk's office of the said court within six months after such estate is declared insolvent: and every such claim shall be verified by the affidavit of the claimant. * * * * * And if no opposition shall be made to the allowance of such claim, in the manner hereinafter provided, within nine months after the time when the said estate was declared insolvent, such claim shall be admitted and allowed as a good and valid claim against the said estate without further proof." Clay's Dig., 194, § 10.

This statute does not require any court of justice to decide that a claim, which is not proved to have been filed after the decree of insolvency, shall be allowed without affidavit or proof. The endorsement of the clerk on the claim in this case, "left on file," is strong *prima facie* evidence that the

leaving it on file was an act occurring before the decree of insolvency. There was no proof that it was filed "after" the decree of insolvency; and therefore, the court did right to reject it, because it never was filed as the statute required, that is, "after" the decree.

Filing a claim before the decree is not authorized by the act of 1843; and therefore, such filing does not *per se* comply with the statute as to filing. Under the proof, as now presented, no court can say that the claim was filed "after the decree." It is barred, because not filed after decree. But even if the claim can be considered as filed after the decree, still it was rightfully rejected.

Exceptions to claims filed under the act of 1843 divide themselves into two classes: 1st. As to the nature of the affirmatory affidavit; 2d. As to all matters of defence to the claim as asserted. The affidavit entitles the claim to be allowed (if filed after the decree,) without further proof, unless an exception is taken within the nine months. But the mere filing of the claim, without an affidavit, has not such an effect. It is the affidavit, in connexion with a filing after the decree, that dispenses with further proof. Cook v. Davis, 12 Ala., 551–554.

When the affidavit is not made as the statute requires, the claim cannot be allowed without further proof. McLaughlin v. Nelms, 9 Ala., 930, next to last paragraph of the opinion. The statute never intended to allow claims against estates, without affidavit and without proof. The pretended affidavit in this case is a nullity. There was no proof of the official character of the pretended South Carolina magistrate; nor of his authority to administer an oath. Chandler v. Hudson, 8 Ala., 366; Fellows v. Miller, 8 Blackf. Rep., 232.

The bill of exceptions does not profess to set forth all the evidence adduced below. The judgment entry and the bill of exceptions are reconcilable, and they show that the court heard the evidence adduced by both parties; that not only evidence as to the filing and affidavit was adduced, but also as to the justice of the claim. The party excepting does not even profess to set out all the evidence; therefore, all intendments must be made in favor of the court below. And as the matter was submitted to the court as a jury, and all pro-

per pleadings dispensed with, it must be intended that all proper proof was made, to convince the court below that the claim was not a just, nor a subsisting debt against the estate.

The motion of Gaffney to reject the objections was properly overruled for the reasons above given, and for the additional reason that such objections ought not to be disposed of in that mode; that is, by motion to reject. Such objections ought to be heard and considered in a different mode. It is important to notice that the only evidence set out in the bill of exceptions relates to Gaffney's motion to reject the objections of the administrator. The evidence as to the justice of the claim, or its injustice, is not pretended to be set out.

PHELAN, J.—Where claims against an insolvent estate are filed within six months from the time when the estate was declared insolvent, all objections to the allowance of such claims on final settlement must be filed in writing, by some creditor or the administrator *de bonis non*, within three months after the expiration of the time allowed for filing claims, or, in other words, within nine months from the date of the decree of insolvency. Hogan v. Calvert's Adm'r, at the present term; 8 Ala., 455; Clay's Dig., 194, §§ 10–11.

If a claim is filed in time, that is, within six months from the decree of insolvency, but is not verified by affidavit; and an objection in writing to such claim, because it is not so verified, is filed in time, that is, within three months after the expiration of the time for filing claims, the affidavit may be supplied at any time before or at the day set for final settlement of the estate. Brown v. Easly, 10 Ala., 566.

Yet, if a claim has been filed in time, but not verified by affidavit, and no objection in writing to such claim is filed within the time allowed for filing objections, that is, three months after the expiration of the time for filing claims, no objection can be heard against the allowance of such claim at the final settlement, for an insufficient verification by affidavit, the want of an affidavit, or any other cause. Hogan v. Calvert's Adm'r, *supra*.

There was no distinct objection at the hearing below, that this claim was not filed in time; that question was doubtless considered as fully settled by the decision of this court when

it was here before. 12 Ala., 624. The only objections distinctly made at the trial, to the allowance of the claim, related to its justness and its proper verification by affidavit. The record shows that these objections were not filed in writing until long after the expiration of nine months from the date of the decree of insolvency, to-wit: on the 18th of July, 1846; and the court decided, against the protest of the claimant, to entertain them, and rejected the claim, on the ground that the same was not sufficiently verified or proved.

In this the court below erred. The claim having been filed in time, and no objection in writing having been filed within the time prescribed by the statute, the Court of Probate should have admitted the claim, without permitting any objection to be heard going to the want of an affidavit, or for an insufficient affidavit, or to the justice of the claim.

If the record is to be construed in any part as presenting the objection that the claim was not filed in time, which may be done on slight ground we admit, since it was competent for the administrator or any creditor to raise this objection even at the hearing; we do not hesitate to decide, that it appears from the record that this claim was filed in time. The decree of insolvency was rendered on the 28th of April, 1845, and on the same day the claim was filed. Now, in the absence of other proof, we are left to conclude whether it was filed *before* or *after* the decree of insolvency. We cannot hesitate, in such case, to hold that it was filed *after*, since that is to give meaning and force, to what would otherwise be a nugatory and unauthorized act.

For the error in entertaining the objections to this claim on account of the insufficiency of the affidavit, made for the first time after nine months from the decree of insolvency had expired, and rejecting the claim for want of proper proof, the decree of the Court of Probate is reversed, and the cause remanded.

BRAINARD *vs.* McDEVITT.

1. Where one claims title to personal property under the second section of the statute of frauds, (Clay's Digest 255,) on the ground of his vendor's possession by way of loan not reduced to writing and recorded, he must show that his vendor, or those through whom his vendor claims, have had possession of the property for three years.
2. If his purchase was before the three years were complete, he cannot add his own possession to that of his vendor, in order to claim the benefit of the act; he must acquire title at the date of his purchase, or the act gives him none.

ERROR to the Circuit Court of Mobile.
Tried before the Hon. L. GIBBONS.

This was an action of detinue brought by McDevitt against Brainard, to recover a negro woman slave. The plaintiff introduced one Roulston as a witness, who proved that he (the plaintiff) purchased her of one Montgomery, for the sum of four hundred dollars, on the 4th day of July, 1845; that immediately after the payment of the purchase money, and the execution of the bill of sale, which was also introduced as evidence of the plaintiff's title, Montgomery left Mobile and was absent about two months; that during the absence of Montgomery, the slave was under the control of McDevitt, but remained at the house or on the premises of Montgomery. The witness also testified, that when Montgomery returned to Mobile he was in very feeble health, and, in consequence thereof, the plaintiff permitted the slave to remain with him for the purpose of nursing and attending him, and she continued with him until his death, about the 18th May, 1848. The defendant, at this stage of the cause, moved the court to exclude the evidence of Roulston, but his motion was overruled, and he excepted.

The defendant then offered proof tending to show, that Montgomery had had peaceable possession of the slave from 1837 up to his death, but the witness did not deny (in the language of the bill of exceptions) that the plaintiff, McDevitt, had had the possession and control of the slave during the absence of Montgomery from Mobile. The defendant also proved, that Montgomery, after the sale to McDevitt,

made a bill of sale of said slave to one James Devine, for the purpose of having said slave emancipated, but it appeared that Devine paid nothing for her. The defendant also proved the execution of a bill of sale for the same slave, by Montgomery, to the defendant, Brainard, bearing date the 14th day of April, 1848; and also proved that, upon the execution of this bill of sale, some money passed from Brainard, the defendant, to Montgomery, but how much the witness did not know. There was no delivery of the slave to the defendant Brainard by Montgomery, but she continued in his possession until his death. There was also evidence tending to show that, after the death of Montgomery, Brainard, through his agent, assumed the control of the slave, but she was permitted to live in the city where she pleased.

The evidence also tended to show, that Montgomery, after the sale to the plaintiff, and before his death, admitted the title of the plaintiff. This being all the testimony, the defendant's counsel moved the court again, to exclude the testimony of the plaintiff, but his motion was overruled.

The court charged the jury, that the time which had elapsed between the death of Montgomery and the assertion of the plaintiff's claim, could not be computed as part of the time necessary to make up the three years required by the statute of frauds; that, as between Montgomery and the plaintiff, the title to the slave was in the plaintiff, if the sale was *bona fide*, and that it must be shown that Montgomery had had continued possession of the slave for three years after the sale, to enable him to convey a good title to the defendant. To these charges the defendant excepted, and also requested several charges, the purport of which was, that the possession of Montgomery, connected with the defendant's possesion since Montgomery's death, gave the defendant a complete title, under our statute of frauds. But the court refused to give them, and the defendant excepted.

BLOCKER, for plaintiff in error:

The plaintiff below claimed the negro in this suit as loanor, and undertook to establish his title by parol testimony. This should have been excluded by the court. 1 Washington's Rep. 139; 3 Call's Rep. 85.

The continued possession of Montgomery up to the time of his death, and the possession of Brainard for more than a year after that event, defeats the title or claim of McDevitt as loanor; for where the owner of personal property voluntarily parts with the possession to another, either with or without an express contract, there must be a will or deed, declaring the loan, reservation, or limitation of use, or property, proved and recorded, as required by the second section of the statute of frauds, or else the absolute property shall be taken to be with the possession, in favor of creditors and purchasers. 3 Henning & M. 456; 3 Call's Rep. 85; 1 Marshall's Rep. 7; 1 Littell's Rep. 112; 4 Munford's Rep. 443; 5 ib. 305; 4 Bibb's Rep. 337; Myers v. Peek, Admr., 2 Ala. 648; Williams v. Harrel, 3 Ala. 371.

When the statute once begins to run in favor of the loanee of personal property, there is no estoppel except by action of the loanor, in asserting his right by due course of law, before the expiration of three years; and a purchaser under the loanee, before the expiration of the three years, is substituted to all his rights, the statute continuing to run in the purchaser's favor. Maul v. Hays, 12 Ala. 499. The doctrine as laid down in the case of Grisett & Agee v. Dumas, 14 Ala. 354–55, fully sustains this view, if the death of the claimant does not stop the running of the statute. Apply the rule to the holder or loanee, and those under him, and the reason of the rule is equally strong and just, and the court erred in charging that the lapse of time between the death of Montgomery and the commencement of this suit, should not be computed as a portion of the time making the three years required by the statute to complete the bar.

The charge asked and refused, "that the limitation of three years prescribed by the statute, vests a complete title in the possessor, in favor of creditors and purchasers, which can not be defeated even by proof of notice to the purchaser, as to how the possession was held," should have been given. It is not abstract, because the issue was the statute of limitations of three years, and every thing pertaining to that statute was involved in the issue. The charge was correct as an abstract legal proposition, and so held by this court in the case of Myers v. Peek's Admr., 2 Ala. 648. The charge was per-

tinent to the issue, and should have been given: because the testimony of the case, taken as a whole, tends to show, that the parties, plaintiff and defendant below, had notice of each other's acts relative to the property in controversy.

PERCY WALKER, for defendant in error:

The refusal of the court below to exclude the testimony, introduced by the plaintiff, was unquestionably correct. There was no predicate for the motion when it was made. The plaintiff below had made out his case. No evidence had been offered by the defendant, and there was no warrant for the idea, that the case was within the statute of frauds.

At that stage of the trial, the defendant below had shown no connection with the title set up by the plaintiff, and was thus within the rule in the case of Dunklin v. Wilkins, et al., 5 Ala. 199.

The court was equally correct in refusing the motion, when it was renewed subsequently, as the testimony of both plaintiff and defendant disclosed that *mala fides* could not be attributed to the plaintiff below, and that he had paid a valuable consideration for the slave. 8 Ala. 105.

The evidence shows a sufficient reason why the possession was allowed to remain with the vendor, Montgomery; that he was in such infirm health as to require the nursing and attendance by the slave.

The evidence also shows, that Montgomery, between the sale and his death, repeatedly admitted the right of ownership in the plaintiff below, and that the plaintiff below always asserted his title. These facts, connected with the good faith of the plaintiff below and the payment by him of a valuable consideration, relieve the case entirely from the second paragraph of the second section of the statute of frauds. Clay's Dig. 255.

The facts disclosed in the record show that the case of the defendant in error is not obnoxious to the last clause of the second section of the statute of frauds.

It cannot be questioned that, after the sale to the defendant in error, the title, as between Montgomery and the defendant in error, was in the latter; that the possession by Montgomery was in no sense adverse, as he repeatedly ac-

knowledged the title of defendant in error; and even if it had been, the three years required by the statute had not elapsed between the sale to defendant in error and that to plaintiff in error. The sale to the latter, even if it had been for a consideration valuable in law, conveyed no title.

The purchaser of a slave stands in no better situation in regard to the title, than the party from whom he purchased. 9 Porter, 72.

The argument of plaintiff in error, that the three years necessary to defeat the title of defendant in error under the statute, could be made, by adding the time which elapsed after the sale to plaintiff, to that which had elapsed between the sale to defendant in error and Montgomery's death, is founded upon a misconception of the statute.

Under that portion of the statute relied upon by plaintiff in error, neither the creditor of, nor a purchaser from the loanee, could acquire any right or title, as against the loanor, until the loanee had held possession for three years.

This is undoubtedly the interpretation of the statute, as applicable to mere voluntary loans, and it cannot be pretended, with any just reasoning, that a harsher interpretation should prevail, in such a case as this, where it is shown that the defendant in error bought the slave for a consideration valuable in law, and that the possession of his vendor did not continue for three years.

It cannot be assumed, that the plaintiff in error stands in any better position under the second section of the statute of frauds, than would a creditor of Montgomery, and it is clear that a creditor could not subject the property as Montgomery's, without proof that the latter, as loanee, had possession of the slave for three years, after the sale to defendant in error, and the right of possession vested in him. 14 Ala. 355, 357-8. See also Myers v. Peck, Admr., 2 Ala. 648.

DARGAN, C. J.—The only question involved in this case, grows out of the second section of our statute of frauds. That section, after prescribing the mode in which personal property shall be conveyed, when the conveyance is not founded on a valuable consideration, goes on to provide, "that where any loan of goods or chattels shall be pretended to

have been made, to any person with whom, or those claiming under him, the possession shall have remained for the space of three years, without demand made and pursued by due course of law on the part of the pretended lender; or where any reservation or limitation shall be pretended to have been made, of a use or property, by way of condition, reversion, remainder or otherwise, in goods or chattels, the possesion whereof shall have remained with another as aforesaid; the same shall be taken, as to the creditors and purchasers of the person remaining in possession, fraudulent within this act, and that the absolute property is with the possession; unless such loan, limitation, or reservation of use or property be declared by will or deed in writing, recorded as aforesaid."

We think it clear, that to give title to a purchaser under this section of the act, the three years contemplated by it must be complete at the date of his purchase. If the three years were not then complete, no title at the date of the purchase could pass to the purchaser; he could not then say, that his vendor had had the possession during the time required by the statute to give him title; and if he obtained no title at the date of his purchase, his subsequent possession could give him none; unless, indeed, he could protect himself under the statute of limitations, which is not pretended in this case.

It is, however, urged, that the statute gives the title, if the possession has remained with the borrower, or those claiming under him, for the space of three years; and as the defendant claims under Montgomery, he has the right to add his own possession to the possession of Montgomery, thus making more than three years before the suit was brought. But we cannot allow the defendant to tack his possession to the possession of Montgomery, to claim the benefit of the statute. The defendant must show, that his vendor, or those through whom his vendor claims, had had the possession for three years. And it is manifest that Montgomery did not have the possession for three years, (after he sold to McDevitt,) before he sold to the defendant.

Now, if the defendant had sold *bona fide* to another, before this suit was brought, then his vendee would have been

entitled to the benefit of his possession, as well as the possession of Montgomery; because his vendee could have said, my vendor and those through whom he claimed, have had possession of the slave for three years, by way of loan not reduced to writing; and thus have brought himself within the very words of the statute. But the defendant cannot say that his vendor, or those through whom he claims, had had three years' possession by way of loan; and, therefore, he has not brought himself within the act, nor can he claim any benefit from it.

There is no error in the ruling of the court, and the judgment must be affirmed.

SMITH'S HEIRS *vs.* BRANCH BANK AT MOBILE.

1. An unrecorded mortgage is valid and binding between the parties themselves; it is also valid as to all subsequent creditors and purchasers with notice of its existence.
2. If the mortgagor sells the land to an innocent *bona fide* purchaser, taking from him a mortgage to secure the purchase money, upon which he obtains a decree of sale in a foreclosure suit, at which *he*, by himself or his agent, becomes the purchaser, he is not in a condition to invoke the protection afforded to a *bona fide* purchaser without notice, so as to defeat the mortgage which he has executed to his vendor: for this would be, to take advantage of his own wrong.
3. At the common law, a freehold title could be released in five ways: 1. To the tenant of the freehold in fact or in law, without any privity; 2. To the remainder-man; 3. To the reversioner without privity; 4. To one having a right only by privity; 5. To one having a privity only without right. But in this country, the technical rules relating to releases are generally held not to apply, and a quit claim deed is considered as passing the title of the releasor, without any warranty as to outstanding titles or incumbrances, but merely against the grantor himself and those claiming under him, either by descent or by subsequent conveyances.
4. A. sold and conveyed to B., and took from him a mortgage to secure the purchase money, which was not recorded within sixty days; B. afterwards sold and conveyed to C., and also took from him a mortgage to secure the purchase money; B. foreclosed his mortgage, and obtained a decree of sale, at which sale he himself became the purchaser by an agent, and afterwards by quit claim deed released all his interest to D., who had no actual notice of A.'s unrecorded mortgage. *Held:*

That, as against A., the release only operated to pass B.'s equity of redemption.

5. Fraud will not be presumed, when the facts out of which it is supposed to arise, may well consist with honesty and pure intention.
6. The fourth head-note to the case of the Ohio Life Insurance and Trust Co. v. Ledyard, (8 Ala. Rep. 866,) corrected and limited.

APPEAL to the Circuit Court of Mobile.

Tried before the Hon L. GIBBONS.

EJECTMENT by the Bank against the plaintiffs in the appeal, who are the heirs at law of Charles Smith, deceased, to recover a lot of ground situate in the city of Mobile, and particularly described in the pleadings. There was a judgment in the court below for the Bank, and appeal by the defendants to this court.

The points for revision are presented by a bill of exceptions, and arise out of the following facts.

The plaintiff proved title to the premises as follows: 1st. A conveyance from Charles Smith, the defendants' ancestor, and J. S. Secor, to Matthew Anderson, dated the 2nd of February, 1836, and a mortgage of the land, bearing the same date, executed by Anderson to Charles Smith to secure the payment of the purchase money, amounting to five hundred and thirty $\frac{1}{1}\frac{5}{0}$ dollars; 2nd. A conveyance by Anderson to Malachi Dubose and Gains Kibbe, dated 22d March, 1836, and a re-coveyance, by way of mortgage, dated the 2nd February, 1836, which recited that it was the same property "which was conveyed by said Anderson to them"; 3d, A deed from said Dubose and Kibbe to one Meggison, dated the 20th June, 1836, and recorded the 2nd July, 1836, and a re-conveyance by Meggison, by way of mortgage, dated 20th June 1836, and recorded the 2nd July, 1836; 4th. Plaintiffs introduced a bill in equity, filed by Dubose and Kibbe on the 17th February, 1838, to which Meggison was the sole defendant, for the purpose of foreclosing the mortgage, and a deed by the master to J. C. Dubose, on a decree of sale made in said cause, dated the 2nd October, 1838, and recorded the 26th of the same month; 5th. A deed from J. C. Dubose to the plaintiff, dated 5th May 1840.

The plaintiff proved, that before this suit was brought,

the lot in controversy was vacant, and had the appearance of always having been a vacant lot, and no other evidence was introduced as to the possession.

The defendants below then proved, that after the sale of the lot in controversy by Anderson to Dubose and Kibbe, by agreement, Smith received from Anderson the note and mortgage given by Dubose and Kibbe, as a substitute and extinguishment of the original note and mortgage which had been executed by Anderson to Smith, and thereupon, Smith cancelled the mortgage of Anderson. The note so substituted was endorsed by Smith, and, together with the mortgage for its security, delivered to one Samuel Todd, who, with Anderson, filed a bill in the proper court to foreclose the mortgage given by said Dubose and Kibbe to Anderson. The said bill was filed the 21st January, 1841, and averred that the note had been transferred to said Todd. Upon this bill, a decree was rendered, that the lot be sold, which was accordingly done, and Samuel Todd became the purchaser; his deed from the master, bearing date the 7th November, 1842. Said Todd re-conveyed the premises to Charles Smith, the defendants' ancestor, on the 1st day of January, 1844.

It was also proved, by J. C. Dubose, that he attended the master's sale in the case of Dubose and Kibbe v. Meggison, and that he bid off the property at the request of M. Dubose, one of the complainants in said bill; "that he bid solely at their request, with no intention of purchasing for himself; that he paid no money, and never had any deed for the land in his possession, or even saw a deed from the master to him: that some time after the sale, M. Dubose came to him with a Bank deed in favor of the plaintiff, and requested him to sign it; which he did, and the deed was taken away by said Dubose: that he never paid any money or other consideration for the property, and never received any; that he owed the Bank nothing, and had no transaction of any kind with it; but in the whole matter acted merely as the agent of M. Dubose."

It was shown, that Dubose and Kibbe were indebted to the Bank, by a note which fell due the 5th day of April 1838, which had been discounted by the Bank, and that on the 6th day of May, 1840, the note was extinguished and delivered

up by the Bank, in consideration of the deed to the premises from J. C. Dubose. The mortgage from Dubose and Kibbe to Anderson was dated the 2nd February 1836, and was not recorded until the 17th September next thereafter. This was introduced and read as evidence by the defendant.

This being all the testimony in the cause, the court gave several charges to the jury, as follows:

1. That the failure of Smith to have the deed of mortgage recorded within sixty days after its execution and delivery, rendered it absolutely void as to subsequent purchasers, although when the purchase was made, the mortgage was recorded. 2. That when a mortgage is not recorded within the time prescribed by law, no subsequent registration will operate by way of notice. 3. That although the evidence showed that the Bank must be regarded as holding directly from Dubose and Kibbe, who had themselves executed the mortgage, and the mortgage was recorded prior to the time of their purchase, yet the Bank was unaffected thereby. 4. That notwithstanding the circumstances under which the Bank received the deed from Dubose, and the character of the consideration, the Bank was not put upon inquiry so as to charge it with notice. 5. That the position of the Bank was in no wise changed by the character of the conveyances of the former parties, nor by the form of the conveyance to itself. 6. That though they might find that Anderson and Todd had filed their bill to foreclose the mortgage from Dubose and Kibbe, and that the *locus in quo* had been sold to satisfy the decree in said foreclosure suit, and that more than five years had elapsed since the execution of such decree of sale, before the commencement of this suit, and that no suit for the redemption of said premises had been instituted by Dubose and Kibbe, or any parties claiming under them, since the decree of sale aforesaid, yet, notwithstanding this, the plaintiff was entitled to recover.

These several charges were duly excepted to by the defendants below, and are now here assigned for error.

P. PHILLIPS, for the appellants:

The mortgage, although not recorded within the time prescribed by law, was registered long prior to the time when

the defendant acquired title, and operated by way of notice. The act of 1831 expressly declares that "all deeds" shall be taken as valid and effective from the time of their registration, provided that it shall not affect the rights of creditors or purchasers, which have vested "prior to such registration." Clay's Dig. 154.

An attempt has been made to draw a distinction between mortgages and absolute conveyances, upon the ground, that the act requiring the latter to be recorded, declares that a failure to comply with its requisition would make the deed "void." Cummings & Cooper v. Snow, 5 Ala 330. But the same term is used in the other statutes; thus, the act of 1823 declares that "any deed executed after this act, shall be void and of no effect," &c., unless the same shall be recorded, &c. Clay's Dig. 154. All of these acts, in reference to conveyances founded on a valuable consideration, stand upon the same footing with the acts of 1828. They are all intended for the same specific purpose, and that is, to give notice. If a conveyance is recorded in time, and is invalid in its execution or consideration, the registration gives it no validity. If the deed is *bona fide*, why should not the registration be regarded as notice from that date? It is sufficient that the statute so expressly declares it, and the court must repeal a positive statute to hold otherwise.

In the case of Cummings, it is clear that the court mistook the statute of 1831. It is entirely misquoted, and the Chief Justice dissents from the opinion. All that is said by the court of the statute, is as follows: "On the 10th January, 1831, time for registering deeds was extended to eighteen months after its passage." It thus distinctly appears, that the provisions now relied upon were never brought to the notice of the court; and a decision founded upon such an error, ought not to stand.

The statute of 1828 declares, that the deed shall be void against creditors and subsequent purchasers without notice. Under this statute, it has been decided that possession constitutes "notice." So did *lis pendens*. So, also, the existence of facts which should have put the party upon inquiry; and the term "creditors," as used in the statute, is declared to embrace those only who have acquired liens.

Who are "purchasers," in the contemplation of the statute? This question is expressly answered by the decision in Walker v. Miller, 11 Ala. 1085. A vendee under a quit claim deed, takes only what his vendor could lawfully convey. See, also, case of Oliver v. Piatt, 3 How. 410. The deeds through which the plaintiffs claimed were mere releases of the right the parties held.

The Bank received the deed under circumstances which bound it to inquire into the title. The evidence shows that the purchase at the register's sale was merely colorabe, and that the deed was, in fact, made by M. Dubose in consideration of an old debt due to the Bank. Dubose and Kibbe sold to Meggison, and on the same day Meggison re-conveys, by way of mortgage, to secure the purchase money. He had, therefore, but an equity of redemption; the legal title was in Dubose and Kibbe, and he has forfeited his right to redeem by non-payment of the money. In this state of facts, Dubose and Kibbe, re-invested with the title, are directly chargeable with notice of the mortgage which they themselves have executed. They then release, or direct to be released, to the plaintiff, in consideration of an old indebtedness, all their right, title and interest, and it is evident that the releasee can acquire no more than the releasor possessed.

The mortgage was foreclosed against Dubose and Kibbe, and the decree of sale executed 1st January, 1844. By the act of 1843, all rights and equities of the Branch Bank, whose claim was derived from the mortgagors, are entirely cut off, unless suit for "redemption be commenced within five years." If redemption is barred, the action of ejectment does not survive. The statute, it will be seen, operates, not from the date of the decree, but from the execution of the decree, that is, the sale; and, doubtless, this was regarded as a proceeding *in rem*, which operated as notice to all the world. Clay's Dig. 429

J. T. Taylor, *contra:*

On the 2nd of February, 1836, Secor and Smith sold and conveyed the land in controversy to M. Anderson, who, on the same day, executed a mortgage to Smith to secure the purchase money. On the 22nd March, 1836, Anderson con-

veyed the premises to Dubose and Kibbe, and they executed a mortgage to Smith, dated back 2nd February, 1836, and which was handed over to Smith by Anderson in exchange for his own, which was cancelled, and entered satisfied on the records, April 8, 1836. On the 20th June, 1836, Dubose and Kibbe sold to J. C. Meggison, and Meggison executed a mortgage to Dubose and Kibbe, to secure the perchase money. In 1838, Dubose and Kibbe filed a bill to foreclose this mortgage; Meggison alone was made defendant. At the register's sale under this foreclosure, the land was bought by J. C. Dubose. (The firm of Dubose and Kibbe was composed of M. Dubose and G. Kibbe); and on the 5th May, 1840, J. C. Dubose conveyed the land to the defendant in error.

Smith, in the mean time, assigned the mortgage and note given to him by Dubose and Kibbe, to one Samuel Todd, who filed his bill, in 1841, to foreclose his mortgage. Dubose and Kibbe alone were made parties. At the sale under this foreclosure, Todd bought, and conveyed back to said Snith, in 1842, who is the ancestor of the plaintiffs in error. Now, the mortgage from Dubose and Kibbe, under which plaintiffs in error claim, was dated in February, 1836, and was not recorded until 17th September 1836, long after the sale to Meggison, under whom the Bank holds. The lot, all the while, was a vacant lot. The Bank was a purchaser for a valuable consideration. The deeds under which it holds are all regular and properly recorded, and there is no pretence of notice to it, or to Meggison, or to J. C. Dubose, of the mortgage from Dubose and Kibbe.

Under these facts, there can be doubt in the case. The mortgage is entirely void, and subsequent registration, after the time prescribed, will not give it any validity. 5 Ala. 324: 12 ib. 646. In the case of Chamberlain v· Adams, which was decided by Judge Dargan, but has not been reported, the deed was not recorded in time, but was properly recorded long before Adams's debt accrued, and it was declared void as to him, and that the statute (Clay's Dig. 256, §§ 8 and 12,) referred only to absolute deeds. It is also decided, that a mortgage is included in the fifth section of the act concerning fraudulent deeds of trust, &c. Clay's Dig. 255; 9 Ala. 209. And a mortgage of land must receive the same construction

as a mortgage of personal property; they are embraced in the same act, the same clause, and the same language is used, except one is required to be recorded in thirty days, and the other in sixty days. There is nothing in the character of the deeds under which the Bank holds. The act makes all deeds void, that have not been recorded properly, as against all subsequent purchasers; and whether they purchased a quit claim or warrantee, can make no difference, so that they are *bona fide* purchasers. A sheriff's or register's deed is nothing more than a quit claim, yet a purchaser at a register's sale is a purchaser contemplated by the act. 8 Ala. 866. This case also decides, that the extinguishment of a valid security, or receiving the land in payment of the grantor's note, is the same as having paid the money. The act of 1843, barring the right of redemption after five years, does not affect this case. If the deed of mortgage, under which they claim, had been recorded, then we would only have had the right of redemption, and would be barred by not having filed our bill. Only subordinate rights, such as admit the legal superiority of the other party, and, in the language of the act, requires a bill in chancery to redeem, are cut off by this act. Here we hold an absolute prior and superior legal title, and are prosecuting ejectment which is only barred by twenty years.

The plaintiffs in error rely somewhat on the fact, that J. C. Dubose paid nothing for the land; that it was really bought by M. Dubose, and paid for by him, in the name of J. C. Dubose. There is no pretence that the Bank knew any thing of all this. Mr. Holcombe testifies, that Dubose and Kibbe owed the Bank a note amounting to $2,581, a discounted note, and M. Dubose proposed to give this land for it, which was accepted, and a deed made by J. C. Dubose. His title, so far as the Bank could see, was perfect, and the master had reported the receipt of the purchase money from him. But, suppose it is admitted that the Bank dealt alone with M. Dubose and Kibbe, and the legal title only was in J. C. Dubose, as a matter of convenience; or suppose they had bought the land at the sale in their own name, and we had purchased from them, why, notice in Dubose and Kibbe does not affect us. Every one who sells or mortgages land twice, of course

has knowledge. J. C. Meggison, who first bought for Dubose and Kibbe, nor any of the subsequent purchasers from him, ever had notice. It has been decided, several times, by our Supreme Court, that a purchaser may protect himself by the want of notice, either in himself or any of his grantors. 8 Ala. 74; 9 ib. 437; 3 ib. 448.

CHILTON, J.—In order to disembarrass this case from the confusion in which so many mesne conveyances involve it, we may consider Smith, the defendant, as the vendor to Dubose and Kibbe, and as holding their mortgage to secure the purchase money. We may then, without changing the legal effect of the facts, lay out of view the sale to Meggison by D. and K., and the foreclosure of the mortgage taken by them; since the land was purchased by their agent, J. C. Dubose, who was the mere conduit for convenience sake of the interest of Dubose and Kibbe to the Bank.

It is too clear to admit of doubt, that an unrecorded mortgage, as between the parties themselves, is valid and binding. It is also valid as to all subsequent creditors or purchasers with notice of its existence. Smith v. Zurcher, 9 Ala. 208; Myers v. Peck's Admr., 2 ib. 648; Tuttle v. Jackson, 6 Wend. 226.

It is equally clear, that if the mortgagor sells the land to an innocent *bona fide* purchaser, taking a mortgage from him to secure the purchase money, and obtains a decree of sale upon a foreclosure suit, at which, by himself or his agent, he becomes the purchaser, he is not in a condition to invoke the protection afforded a *bona fide* purchaser without notice, so as to defeat the mortgage he has executed to his vendor; for this would be to take advantage of his own wrong. "His conscience," says Judge Story, "is still bound by his meditated fraud, and if the estate revests in him, the original rights attach." 1 Story's Eq. § 410. The case, then, resolves itself into this: Considering Dubose and Kibbe as mortgagors to Smith, whose mortgage was not recorded, and as the vendors to the Bank, through their agent, J. C. Dubose, who swears he was a mere naked trustee, without any interest whatever, does the Bank, under the circumstances, and in view of the character of the deed executed to it, occupy the position of a *bona fide* purchaser for a valuable consideration

without notice, within the meaning of our statutes declaring mortgages of real estate not recorded within sixty days to be void as against such purchasers?

The instrument under which the Bank claims, is a quit claim deed, or, what is more appropriately designated by the common law term, a release. The effective words are, "that the said Dubose doth remise, release and forever quit claim, all his right, title, claim, &c., unto the said Branch Bank, in the full and actual possession now being, and its successors and assigns forever." It is said in the Touchstone (p. 320) that the words most common and appropriate in a release, are, *remisi*, *relaxavi*, and *quietum clamavi;* and that a release may enure by way of passing the estate, as where one joint tenant or co-parcener releases his right to the other; or by way of passing the right, as where the disseisee releases to the disseisor; or, it may operate by way of enlarging an estate, where the releasee has an estate capable of being enlarged, and is in privity with the releasor; or by way of extinguishment. Gilb. on Ten. 55; Shep. Touch. 321; Co. Lit. 272; Bouv. Inst. vol. 2, p. 412.

At the common law, it is said, a freehold title could be released in five ways: 1. To the tenant of the freehold in fact or in law without any privity; 2. To the remainder-man; 3. To the reversioner without privity; 4. To one having a right only by privity; and, 5. To one having a privity only without right. 2 Bouv. Inst. 412; Gilb. Ten. 53; Co. Lit. 265. So that, according to the principles of the common law governing releases, the Bank, the releasee in this case, filling none of the above requisites, would not take the title of the releasor. But in this country, the technical rules relating to a release are generally held not to apply, and a quit claim deed is considered as passing the title of the releasor, without any warranty as to outstanding titles or incumbrances, but merely against the grantor himself, and those claiming under him, by descent, or by subsequent conveyances of the same interest previously transferred.

The grantor in this case only purports to release and quit claim the title and interest which he had. The question then arises, what interest did he have? The plain answer is, the mere equity of redemption, nothing more, and this only

passed by the quit claim deed. Thus the Bank stands in the place of Dubose and Kibbe, the mortgagors, holding only what they could sell, the equity of redemption.

Were we to hold that M. Dubose intended that his agent, J. C. Dubose, should sell a greater interest than he really had, and by so doing enable the Bank to shelter itself under the plea of being a *bona fide* purchaser for a valuable consideration, so as to defeat the mortgage which D. and K. had executed to Anderson, we should impute a fraudulent intent to the parties, when the deed which their agent has entered into justifies no such inference.

The unregistered mortgage being valid and effectual as between the mortgagor and mortgagee, the subsequent sale of the entire estate by the mortgagor is a fraud upon the rights of the mortgagee; and the reason, I apprehend, upon which the statute proceeds in preferring the subsequent *bona fide* purchaser to the mortgagee, is, that one of two innocent persons must suffer by the fraud of a third party, and the mortgagee, failing to use the diligence which the statute requires in recording his mortgage, is considered most in default, and is therefore properly adjudged by the statute to bear the loss.

But we are not allowed by the rules of law, any more than by the principles of common charity, to suppose fraud, when the facts out of which it is supposed to arise may well consist with honesty and pure intention. State v. Kinkle & Lehr, 3 Ala. 352.

We cannot, therefore, in this case presume that the vendor of the Bank attempted to sell more than he might lawfully sell, which was the equity of redemption. This was his title, and this alone enures by the quit claim.

To enlarge the interest by construction, would be to make a different contract from that which the parties have entered into: would be, by judicial interpretation, contrary to the face of the deed and the facts on which it is founded, to pass the entire estate, by investing it with the consequences of a fraudulent sale of the whole, when the grantor had but the equity of redemption; and this, too, for the purpose of defeating the just lien of Smith for the purchase money which is due from Dubose and Kibbe. We feel quite confident no case can be found which carries the doctrine thus far.

The case of Oliver v. Piatt, 3 How. U. S. Rep. 333–410, which is cited with seeming approval by this court in Walker, et al. v. Miller & Co., 11 Ala. 1067, fully sustains us in the position, that the Bank, holding a mere quit claim deed, cannot be regarded as a *bona fide* purchaser for a valuable consideration without notice. And we see no reason why such purchaser should be allowed to invoke the aid of the registry statute, to avoid a prior mortgage which has not been recorded, any more than the aid of the Chancery Court for his protection.

We express no opinion as to what we should decide, had the deed to the Bank, even though it contained no warranty, purported to convey the entire title to the premises, instead merely of that which the grantor had. But we desire to limit our opinion to the facts of the case before us, lest parties should be misled as to the extent of it.

The case of the Ohio Life Insurance and Trust Co. v. Ledyard, 8 Ala. 866, does not in any way militate against the view which we have above expressed. In that case, the fourth head note is well calculated to mislead, unless taken in connection with that which precedes it. It is there said, that, "one who purchases at a sale made by order of a court of chancery, foreclosing a mortgage, without notice of a prior unregistered deed, is a purchaser for a valuable consideration within the meaning of our registry acts." So reads the fourth head note. But suppose the mortgage had been merely upon a term of six months, or upon the equity of redemption under the prior mortgage, and the decree had ordered a sale only of this interest, it is clear the purchaser under the master's sale, taking only the interest of the mortgagor, would stand in no better condition than the mortgagor himself, and be bound by the prior mortgage, since he would have acquired no title inconsistent with it. In the case, however, just cited, the purchaser succeeded to the right of the trustee and *cestuis que trust*, who were protected as *bona fide* purchasers without notice of Ledyard's mortgage, and, thus considered, it is clear the purchaser under the decree was protected. The third head note, which explains the fourth, shows how the purchaser was protected.

The view we have taken, renders it unnecesary to examine he other points raised.

After the best consideration we have been able to bestow upon this case, we are satisfied that the court mistook the law in several of the charges given. Its judgment must, therefore, be reversed, and the cause remanded.

CRIST *vs.* THE STATE.

1. On the trial of an indictment for murder, the question before the jury was, the identity of the prisoner with the murderer. The State offered in evidence the registers of three several hotels, each from a different city, and each containing a different name, accompanied by parol proof that the three names were written by the prisoner, and that he was known by them respectively in the three cities; and they were admitted without objection from the prisoner. *It was held:*

   That, in considering the question whether the three names were written by the same person, the jury might compare the hand-writings in the several registers.

2. There is not any fixed form of words, in which the minute entries of courts are required to be made. They should show substantially that all was done at the trial which the law requires to be done, and this should be set down in fit and expressive words; but the form adopted in England, and followed in some of the United States, is not indispensably necessary to their legal sufficiency.

3. Although a trial may continue through several days of the term, and the adjournment and re-assembling of the court may be noted by the clerk on the minutes; yet, all that is recorded therein, from the beginning of the trial to the judgment, must be regarded as but one entry, and the whole may be looked to, to ascertain its sufficiency.

4. Where the minute entry in the record recited: "Thereupon came a jury, to-wit:" (here follow their names) "good and lawful jurors, who were selected and empanneled, well and truly to try the issue joined between the State of Alabama and the said defendant, and the trial of said cause commenced," and that the court adjourned in the evening until the following morning, the trial not being finished; and the next minute entry, after reciting that the court re-assembled on the following morning, continues: "Thereupon also came the defendant and his counsel, as also the counsel for the State, together with the jury that had been empanneled *and sworn as aforesaid*, and the trial of said cause was resumed; and after the evidence of all the witnesses had been given in, and the argument of counsel had been heard, the jury received the charge of the court, and retired in charge of the sheriff to make up their verdict, and now return into court, and *on their oaths* do say," &c. *It was held:*

   That it sufficiently appeared from the record that the jury was sworn; and that the Appellate Court would presume they were sworn before the testimony was heard.

5. When the jury in a criminal case is sworn "well and truly to try the issue joined between the State of Alabama and the said defendant," and the record shows that the defendant had been arraigned on an indictment for murder, and that he had pleaded "not guilty," the oath is a sufficient compliance with the requirements of the forty-sixth section of the tenth chapter of the Penal Code, (Clay's Digest 458.)
6. Whether the objection can avail in any case, that the past instead of the present tense is employed in recording the action of the court and jury, *quaere?*

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

The plaintiff in error, Nathan H. Crist, was indicted in the City Court of Mobile, for the murder of Theodore Nye. On the trial, a bill of exceptions was signed and sealed at the instance of the prisoner, and made part of the record by the court. It is in the following language:

"On the trial of this cause, it appeared in evidence, that on the 25th day of February, 1852, at about ten o'clock A. M., two persons arrived at the Eutaw House, in Mobile, and wrote their names on the register of the house, one as Theodore Nye, the other as N. P. Coleman; and they were known and passed by those names in Mobile; that they were put in a room together at their request.

On the morning of the 26th of February, 1852, Nye was found dead in his bed, with a contusion on his head, apparently made with a hammer, and with a towel bound tightly around his neck; a hammer was found under his bed. There was evidence tending to show, that Coleman had murdered him and had fled. The State offered in evidence the register kept at Tuft's Hotel, in New Orleans, containing the names of persons who applied for board at that hotel on the 21st February, 1852; and proved by one Baker, that the name of Nathan H. Crist, as found on said register of that day, was written by the prisoner as his name; that the prisoner came to the hotel on that day with Nye; that they roomed together; and that on the 24th February, they left that hotel together, to go, as they said, to Mobile.

The State then introduced in evidence the register of the Eutaw House, in Mobile, and proved by one A. H. Roulston, that the name of N. P. Coleman, entered on said register of the 25th of February, 1852, was written by the prisoner as

his name; that he came to the hotel on the 25th February, 1852, with Nye, and that they roomed together, &c.

The State then introduced in evidence the register of the Exchange Hotel, of Montgomery, Ala., and proved by one Bolling, that the name of B. F. Tooker, entered on said register of the 29th February, 1852, was written by the prisoner as his name.

The State then introduced one Fleming, and proved by him that he sold the hammer, with which the homicide was committed, on the 25th February, 1852, and that he believed the prisoner to be the man to whom he sold it. The State also introduced several witnesses who testified, that the prisoner was in Mobile on the 25th February, 1852, during the night of that day, and on the morning of the 26th February, 1852.

The prisoner introduced W. L. Curl as a witness, who testified, that the prisoner left New Orleans on the 25th of February, 1852, in company with the witness; that the boat leaves New Orleans about mid-day, and arrives at Mobile on the next morning; and that they did not arrive in Mobile until the morning of the 26th of February, 1852, at an hour after the homicide was committed.

There was also other evidence for the State, and for the prisoner.

Among other charges, the prisoner asked the court to charge the jury, that they could not compare the several registers in evidence, with the view of ascertaining by that comparison that the name of N. P. Coleman, contained in the register of the Eutaw House, was in the hand-writing of the prisoner. This charge the court refused; and charged the jury, that inasmuch as the registers of Tuft's Hotel, the Eutaw House, and the Exchange Hotel, were in evidence before them, with the evidence of the witnesses as to the person who wrote the names Crist, Coleman, and Tooker, they might examine them in their retirement, in considering the question whether or not they were the hand-writing of one person. To the refusal to charge, and to the charge given, the prisoner excepted."

The minute entries in the record upon which assignments of error are founded, are as follows:

"This day came the State of Alabama by its solicitor, and also came the defendant in person and with his counsel; and thereupon he was arraigned upon an indictment charging him with the murder of Theodore Nye, to which, after hearing the same carefully read, he plead 'not guilty;' and the court thereupon, at the request of all parties, set the trial of said cause for Monday, June 28, 1852," &c.

"This day came the State of Alabama by its solicitor, and also came the defendant in person and by his counsel; and the plea of 'not guilty' having been made at a former day of the court, thereupon came a jury, to wit: [here follow twelve names,] good and lawful jurors, who were selected and empanneled, well and truly to try the issue joined between the State of Alabama and the said defendant; and the trial of said cause commenced, and proceeded until the hour of 9 o'clock in the evening, when, by the consent of parties, the court took an intermission until 10 o'clock to-morrow morning, the jury being left in the charge of the sheriff."

"Tuesday morning, June 29, 1852. The Hon. Alexander McKinstry, Judge, appearing in court at 10 o'clock, thereupon also came the defendant and his counsel, as also the counsel for the State, together with the jury that had been empanneled and sworn as aforesaid, and who had remained in the custody of the sheriff since 9 o'clock the night before, and the trial of said cause was resumed; and after the evidence of all the witnesses had been given in, and the argument of counsel had been heard, the jury received the charge of the court, and retired in charge of the sheriff to make up their verdict, and now return into court, and on their oaths do say, 'We, the jury, find the defendant guilty of murder in the first degree, and sentence him to the punishment of death.' It is therefore considered," &c. [Here follows the judgment for costs, &c.]

"And afterwards, to wit: &c., the following sentence was pronounced by the court in this cause, to wit:" [Here follows the sentence in the usual form.]

The errors assigned are:

1. The refusal of the court to give the charge asked by the prisoner;

2. The charge given by the court;

3. The record does not show that the jury trying the cause were sworn;

4. The record does not show that the jury were properly sworn;

5. The acts of the court below are not recorded in the present tense;

6. Other errors apparent upon the inspection of the record.

PERCY WALKER, for plaintiff in error:

1. The court erred in refusing the charge asked, and in the charge given. It is now well settled in England and several American courts, that it is not allowable to prove the hand-writing of a party, by a comparison of the disputed paper with other writings admitted or proven to be genuine. 5 Adol. & El. 703; 2 C. & P. 477; 2 Stark. on Ev. 375; 3 New Hamp. 47; 1 Denio 343; 1 Iredell (Law) 16; 4 Wash. C. C. 729. This court has laid down the rule in two cases, that comparison could not be made by the jury. 2 Ala. 703; 5 ib. 747. The same ruling was made by Lord Eldon, in Eagleton v. Kingston, 8 Ves. 475. See also 1 Leigh 216; Anthon's R. (N. Y.) 97; 1 Dana 179; 9 Cowen 94. It is true, the precise point here raised was not presented to this court in either one of the two cases above referred to. In those cases, no evidence was adduced of the execution by the party of the writing in question. In this case, one witness testifies in behalf of the State, that the name of N. P. Coleman on the register of the Eutaw House, was written by the plaintiff in error. This is not sufficient to take the case out of the rule. The direct conflict between the testimony of Roulston and Curl brings the case fully under the operation of the rule.

If it is improper for a jury to compare hand-writings under particular circumstances, it is improper under all circumstances. The same reasons for denying them the right, when no evidence is before them that the disputed writing was made by the party, equally apply when there is a conflict of testimony on that point. In the one case, their conclusion is drawn solely from the comparison; in the other, comparison is resorted to for the purpose of settling doubts caused by the conflict of testimony. In each case, it is the comparison that shapes and determines their decision. In the case cited from

Anthon's (N. Y.) Reports, it is expressly ruled, that "comparison of hands is not admissible as subsidiary testimony, upon the clashing of oral proof." The distinction drawn by some courts, between comparison by witnesses and comparison by juries, is not warranted by correct reasoning. The general rule is, that it is error to admit as evidence of hand-writing the mere opinion and belief of a witness, without his first stating his means of acquiring a knowledge of such hand-writing. 17 Ohio R. 16. This court has adopted a different rule, in Henderson v. Br. Bk. Montgomery, 11 Ala. R. 855; but under this decision, a witness is not competent, unless he knows the hand-writing of a party. The recognized doctrine is undoubtedly that laid down by Gaston, C. J., in Pope v. Askew, 1 Ired. (Law) R. 16. Wherein is the inapplicability of this rule to a comparison by a jury? When witnesses are examined and testify under this rule, the verdict of the jury is controlled by the belief of the witness, "founded upon previous sufficient means of knowledge." When the jury themselves make the comparison, their verdict results from their belief, without their having any "previous sufficient means of observation," and without their having any "exemplar of the party's hand-writing" in their minds.

Again; to allow comparison by a jury, makes each juror a witness before the others, expressing his opinions, &c., not under oath. See 1 Leigh, 228, where the most conclusive reasons are stated, against allowing comparison by a jury.

Those courts which have permitted comparison of hands by a jury, rest their decision upon what they term "the impracticability of preventing it." But this is no legal reason. The court is bound to charge the law as it is; and the probable perverseness or stupidity of a jury constitutes no sufficient reason for not giving them proper instructions. "The best rule is, that comparison of writings by the jury shall not be allowed, in any case where it can be avoided. When we consider that the same course which is permitted in a case like this, may also be resorted to in a criminal case, for the purpose of conviction, we cannot draw the limit too carefully." *Per* Lord Denman, in Doe *ex dem.* Perry v. Newton and wife, 31 E. C. L. R. 383. The charge asked by the plaintiff

in error, and refused by the court, was in conformity with the rule prescribed in 2 Ala. R. 703, and 5 ib. 747, and therefore should have been given. The bill of exceptions shows that the charge was warranted by the facts: that it was not abstract; and that the charge given by the court was calculated to impress upon the minds of the jury, that the principle of law requested to be given was denied by the court. This is error for which the judgment should be reversed, even under the rule laid down in the late case of Long v. Rodgers, 19 Ala. R. 321.

2. The record does not show that the jury was sworn: and this is a fatal error. It is true, that the minute entry of the proceedings of the second day of the trial, uses the terms, "empanneled and sworn as aforesaid;" but this does not cure the error. The words "sworn as aforesaid" have no efficacy; for there is nothing in the previous part of the entry to which they can refer—no antecedent. If, in an indictment, the place be laid "at B. aforesaid." when B. was not previously named, it is an incurable error. 1 Chitty's Crim. Law. 200. The same objection applies to the concluding portion of the entry, where it is recited that the jury "now return into court, and on their oaths do say," &c. The latter statement can mean nothing; for there is no warrant for it in the preceding portion of the entry.

But admitting the record shows the jury were sworn, it certainly shows that the proper oath was not administered to them. The form of oath invariably used in England, was substantially the form used in the State v. Jones, 5 Ala. 666: and this court ruled it to be the proper form. The oath prescribed in § 46, Ch. 10 of the Penal Code, is designed merely as a general oath to be administered to the jury for the term or week collectively. It does not apply to capital cases, for which special trials are provided, and special jurors are summoned, every step in whose organization is guarded with the utmost particularity, showing that the life of the accused is not to be sacrificed or endangered by the prejudice of juries or the inattention of courts. *In favorem vitæ*, the court will not intend that the proper oath was administered, but it must clearly and distinctly appear upon the record.

3. In the record of the judgment, the acts of the court are

not stated in the present tense. This is a fatal error. 1 Chitty's Crim. Law, 720–1; 1 Mod. 81; 3 Saunders 392; 1 Term Rep. 320.

M. A Baldwin, Attorney General, and D. C. Anderson, Solicitor of the sixth Judicial Circuit, for the State:

1. When writings admitted to be genuine are already in evidence before a jury, they may compare a disputed writing with them, in determining the question of its genuineness. This rule is laid down, without qualification or exception, in Green. Ev. § 578, and cases there cited. In this case the hand-writing of Crist on the registers at New Orleans and Montgomery was proved, and those registers were admitted in evidence without objection on the part of the prisoner. It was then perfectly competent for the jury to compare the hand-writing of the names in them with that of the register of the Eutaw House, to determine whether the name of N. P. Coleman was also his writing. The conflict of testimony between Roulston and Curl, does not avoid the application of the rule, but makes the comparison more necessary and proper. State v. Givens, 5 Ala. R. 757. From the very nature of the case, it would be impracticable to prevent a comparison by the jury. 2 Ala. R. 703; 5 ib. 757. It is not contended on the part of the State, that the jury may compare writings which are introduced for the mere purpose of forming comparisons; but only that they may compare writings already in evidence, admitted or proved to be genuine, with the disputed writing, to determine whether it is genuine. In all the cases cited by plaintiff's counsel, the writings were introduced for the sake of comparison.

2. It is not necessary that the record should show that the jury were sworn. This was decided by this court in Minor's R. 62, and re-affirmed in Perdue v. Burnett, ib. 141; and no subsequent case has occurred, in which a contrary doctrine is held. All reasonable intendments will be made in favor of the regularity of the proceedings of courts of general jurisdiction. 1 Ala. R. 592; 2 ib. 287; 6 Porter 352; 9 ib. 310; 6 Ala. R. 486. But the record does show, with reasonable certainty, that the jury were sworn. The minute entry recites, that "they returned into court, and on their oaths do

say," &c., and the previous entry recites, that they were "empanneled and sworn as aforesaid," thus showing conclusively that the failure to insert the same fact in the first entry, was a mere clerical omission.

Even if the record contained no evidence that the jury were sworn, it is an irregularity which will be presumed to have been waived, in the absence of an exception in the court below, and the objection cannot be raised for the first time in the Appellate Court.

3. The form of the oath administered to jurors, is not material. 1 Chitty's Crim. Law 552.

LIGON, J.—I do not think there is any error in the record, so far as the bill of exceptions discloses the proceeding of the court below.

The facts set out show, that the several registers of the Eutaw House, Tuft's Hotel, and the Exchange Hotel were permitted to go to the jury without objection, accompanied by parol proof which tended to show that the names of "Nathan H. Crist," on the first, of "N. P. Coleman," on the second, and "B. F. Tooker," on the third, were severally written on them by the plaintiff in error, and that these were the names which he assumed in the several cities of New Orleans, Mobile and Montgomery. The jury being thus possessed of the writings, without the objection of the plaintiff in error, the law does not deny them the right to compare these signatures one with another, in order, by such comparison, to aid them in coming to a conclusion as to whether the name of N. P Coleman, found in that of the Eutaw House, was written by the plaintiff in error, and is the writing of the same person who wrote the two others.

Mr. Phillips, in his work on Evidence, lays down both the rule and the reason on which it is founded, in the following words: "Within a recent period a rule has been established, which amounts to a considerable relaxation of the strictness of the law in regard to the direct comparison of hand-writing. It is this: that a jury, upon a question respecting the identity of hand-writing, may take other papers already in evidence, and compare them with that which is in dispute, for the purpose of coming to a conclusion, from comparison, whether the disputed hand-writing is genuine." 1 Phil. Ev., 654–5.

"The principle on which this rule is founded, has been stated to be, that the jury having the documents before their eyes, and being obliged to look at them for another purpose, it is impossible to prevent their forming some opinion with respect to their being like or unlike the disputed writing; and, consequently, when their minds must be so employed, it is better for the court to enter into the examination, and to suggest such observations as may occur to it as to the value of such evidence. It may be remarked, that, from the constitution of the human mind, a jury might be expected to feel some gratification of curiosity in the discovery of minute coincidences in hand-writing, and that this feeling might often mislead them, even where the coincidences were fanciful or accidental.

"To prevent such consequences, a qualification is engrafted on the last mentioned rule, which is, that documents irrelevant to the issues on the record are not to be received in evidence at the trial, in order to enable a jury to institute such a comparison. The principle which has been above stated, as that on which a jury are allowed to compare hand-writings, does not extend to the admission of documents irrelevant to the cause. Such as are connected with the cause must be proved to be genuine, for the purpose of determining the matters in controversy."

Mr. Greenleaf, speaking of the relaxation of, and exceptions to the rule which requires that no evidence of hand-writing shall be allowed, except that of a witness who has a personal knowledge of the hand-writing of the party, states, as a second exception, "where other writings, admitted to be genuine, are already in the case. Here the comparison may be made by the jury. The reason assigned for this is, that as the jury are entitled to look at such writings for one purpose, it is better to permit them, under the advice and direction of the court, to examine them for all purposes, than to embarrass them with impracticable distinctions to the peril of the cause." 1 Greenl. Ev., 734, § 578.

These rules are generally received and acted upon in the English and most of the American courts, and clearly demonstrate the propriety of the charge given in the court below. Although in this case the hand-writing exhibited on the sev-

eral registers was not admitted by the plaintiff in error to be genuine, yet it appears to have been proved to be his by credible witnesses, and in two instances by testimony wholly unimpeached, and was permitted to go to the jury without any objection on the part of the plaintiff in error. This, I apprehend, will as effectually establish its genuineness, as though it had been admitted by the prisoner. After the jury had thus obtained possession of the writings, the court could not, according to well settled principles of the law, divest them of that possession, or deprive them, by its charge, of their privilege of comparing them with each other, to aid them in coming to a conclusion as to the genuineness of either.

The fact, that the testimony of the witness, Curl, conflicts with that of Roulston, who testified that the prisoner wrote the name of "N. P. Coleman" on the register of the Eutaw House on the 25th of February, 1852, when the balance of the record is examined, casts but little if any suspicion on the testimony of the latter. Curl swears, that the prisoner did not reach Mobile until the 26th of February, the day after the homicide for which he was indicted had been perpetrated, and that he came with Crist from New Orleans on that occasion in the same vessel. Opposed to this, however, is the testimony of Roulston, Fleming, and, in the language of the bill of exceptions, "several other witnesses," all of whom testified that the prisoner was in Mobile on the 25th of February, on the night of which day Nye was killed. None of these witnesses were impeached, and as Roulston is thus sustained, his testimony is sufficient to establish the hand-writing of the prisoner on the register of the Eutaw House.

But suppose a shade of suspicion had been cast upon the evidence of the genuineness of the hand-writing on this register, yet, as the testimony was sufficient to allow the writing on the register to go to the jury, and that, too, as far as we are advised, without any objection on the part of the prisoner, I can see no reason why the privilege of comparing this hand-writing with the others, in order to ascertain its genuineness, should be taken from the jury. That they could, under such circumstances, resort to such comparison for that purpose, has been already decided by this court in the case of the State v. Givens, 5 Ala., 747, in which it was said that, "where there

is other evidence, and the jury are in doubt, it is perhaps proper that they should, for the purpose of satisfying their minds, refer to writings which have been offered as proof in the cause. But whether or not it be correct to do so, in the nature of things it would seem impracticable to prevent it, as the jury are not bound to disclose the ground on which they attained a conclusion."

When it is apparent that that which is contended for as a rule to govern courts in the administration of justice, is in itself impracticable, and cannot be enforced by the court, such impracticability will be conclusive against its existence as a rule.

None of the cases to which we have been referred by the counsel for the plaintiff in error, conflict directly with these views. Most of them relate to attempts made on the trial to introduce instruments foreign to the issue, for the purpose of instituting a comparison to establish the genuineness of the disputed instrument. They all hold that this is not allowable. That, however, is not the question presented by the record before us, and consequently we express no opinion upon it.

The next error to which our attention is called, is supposed to be found in that portion of the minutes of the court which record its action at the time of, and during the trial, and it is said that this does not show that the jury was sworn. It may be here remarked, that we are not aware that there exists now, or ever has existed in the courts of this State, any fixed form of words in which such entries are required to be made. The form adopted in England, and followed in some of the United States, is not indispensable to the legal sufficiency of such entries. To make them good, they should show substantially that all was done at the trial which the law requires to be done, and this must be set down in fit and expressive words. No precise combination of them is necessary to the validity of the entry, although it is more comely and appropriate when made with a due regard to form, than when such form is wholly or to a great extent abandoned. Although the trial may continue during several days of the term, and the adjournment and re-assembling of the court may be noted by the clerk on his minutes, still, all that is recorded therein from the beginning of the trial to the judgment must be regarded as but one entry, and we may look to the whole to ascertain its sufficiency. 1 Douglass, 306.

However unclerical may be several of the terms found in this record, and however much it may be regretted that in, a record of so grave a character, any deviation from the appropriate language of ordinary forms may occur, yet, on the record, such as it is, there is no rational ground for doubt as to whether the jury were sworn before they entered upon the discharge of their highly responsible duties. The entry recites, "This day came the State of Alabama, by its solicitor, and also came the defendant in person and by counsel, and the plea of not guilty having been made at a former day of the court, thereupon came a jury, to-wit: (here follow twelve names,) good and lawful jurors, who were selected and empanneled well and truly to try the issue joined between the State of Alabama and the said defendant;——and after the evidence of all the witnesses had been given in, and the argument of counsel had been heard, the jury received the charge of the court, and retired in charge of the sheriff to make up their verdict, and now return into court and *on their oaths* do say, we, the jury, find the defendant guilty," &c. It is also stated in said minute entry, at the part of it which is left blank in the extract above, that the court, by consent of parties, adjourned over from Monday evening until Tuesday morning, when it again met, the prisoner and his counsel and the solicitor for the State being present; and it proceeds, "together with the jury that had been empanneled and sworn as aforesaid." Here we have the terms "good and lawful jurors" returning their verdict "on their oaths," grouped together in the same entry. It would be difficult to arrive at any other reasonable conclusion, than that they were sworn. With a knowledge of the practice universally prevailing in this State, of swearing the jury in all cases before the testimony is introduced, it is not carrying the doctrine of intendment in favor of the regularity of the proceedings in courts of general jurisdiction too far, or to an unauthorized extent, to hold, that the jury in this case were sworn before they heard the testimony. "It is enough that the records of such a court are certain to a certain intent in general. It is not necessary that they should be certain to a certain intent in every particular, so as absolutely to exclude every possible conclusion, and all argument, presumption or inference against them. The time was in England, when, it

being entirely at the pleasure of the crown to grant or refuse a writ of error in a criminal case, subtle objections like that now raised were allowed to prevail, in order to carry into effect the presumed will of the crown to extend mercy to the prisoner. But it has long since been settled there, and certainly is the law here, that a judgment in a criminal case cannot be reversed without showing substantial error." The State v. Christmas, 4 Dev. & Bat., 410.

It is also said to be error, because by the record it appears that the nature and form of the oath administered to the jury was the same as that administered in the trial of ordinary issues before them, when it is insisted it should show that an oath conforming to that administered to jurors by the English courts in capital cases, or at least approximating to that oath, had been administered. Were this question entirely an open one in this State, we should regard the objection much too technical to deserve favor. But an objection substantially the same was made in the case of the State v. Pile & Pile, 6 Ala., 72, and was overruled by the court. In that case it had a claim to favor which it has not here, as it had been made in the court which tried the cause, and not for the first time in this court.

The record here shows that the jury was sworn "well and truly to try the issue joined between the State of Alabama and the defendant." We are at no loss as to what that issue was; for the same record distinctly informs us, that the defendant had been arraigned on an indictment at the instance of the State, charging him with the crime of murder, and that he had pleaded not guilty. His guilt or innocence of this charge was the only issue they could try. The oath recited in the record is a sufficient compliance with the requirements of § 46, 10th chap. of the Penal Code. The oath there prescribed by its terms is extended to both civil and criminal cases, and virtually abolishes or renders unnecessary the oath contended for by the counsel for the prisoner, and all others heretofore administered in such cases.

The objection that the wrong tense is employed in recording the action of the court and jury, that the past and not the present tense is used in reference to it, if of any value in any case, does not apply to this record.

It only remains to add, that there is no substantial error in the record, and the judgment is affirmed.

BENJE *vs.* CREAGH'S ADM'R.

1. The action of the Circuit Court in refusing to grant a new trial cannot be reviewed in the Appellate Court.
2. As a general rule, it is the duty of the hirer, in the absence of any express stipulation, to return a slave when the bailment is determined; and on his failure to do so, the bailor may either treat the bailment as ended, and bring his action, or, where the hiring is from year to year or a less time, may consider the bailment as continuing or renewed; and in this class of cases, the question whether the bailment continues is for the jury to determine.
3. The gist of the action of detinue is the *wrongful detention* of the property, and therefore the action cannot be maintained where the holding over was permissive, so long as that kind of possession continues.
4. Where the character of the defendant's possession is in issue, it cannot be proved by general reputation, nor by the opinion of witnesses as to the actual condition of the property.
5. In all cases where the fact of adverse possession is involved, the party claiming such possession must manifest it, by acts which, if brought to the knowledge of the opposite party, would clearly show him that the possession asserted was hostile to his own.
6. Where the defendant acquires and holds possession under the plaintiff, and, upon suit brought after the expiration of six years, attempts to defeat the action by showing adverse possession, the character of that possession must be brought home to the knowledge of the plaintiff; and the jury are not *bound* to infer such knowledge, from the fact that the defendant claimed the property publicly and notoriously under an adverse title.
7. Adverse possession is a question of fact, and the weight of circumstances tending to establish it must be determined by the jury, and not by the court.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. JOHN BRAGG.

The defendant in error, as the administrator of G. W. Creagh, deceased, brought his action of detinue against Benje, the plaintiff in error, to recover certain slaves. The statute of limitations and the general issue were pleaded. The evidence on the part of the plaintiff established a demand, and tended to show that the defendant came into the possession

of the slaves in 1833, by hiring from his intestate, that the hiring continued from 1833 to 1837, and that the defendant, during that period, repeatedly acknowledged the intestate's title.

The defendant introduced a deed of gift to the slaves, made to his daughter in 1825, and proved that the maker of the deed was the owner of the slaves at the time of its execution. A witness, who was closely connected with the family of the defendant. testified, that he had been much in the family, and had always understood that the defendant claimed the slaves as the property of his children. The defendant also offered to prove, that such was the general understanding in the neighborhood where he lived, and that officers had declined to levy executions on the slaves, because they supposed them to be the property of the children, and not of the defendant himself; which evidence was rejected by the court. There was no evidence tending to show that the intestate had actual notice of the adverse claim set up by the defendant to the slaves.

Upon this state of facts, the court charged;

1. That the finding of the jury would depend upon the manner in which the defendant Benje held the slaves; that a hiring constituted a bailment between the parties, and that unless the character of the holding had been changed, the defendant must be considered as a mere bailee;

2. That a bailee could not set up an outstanding title, against the party under whom he held;

3. That six years' adverse possession before suit brought, on the part of the defendant, would constitute a good defence; but to make such possession adverse, it was necessary that he should disavow to the plaintiff's intestate that he held under him, or that his possession should be so notorious as necessarily to put such intestate on his guard; and that unless this was done, the adverse holding on the part of the defendant could only be considered as commencing from the demand made by the plaintiff and the refusal to surrender the property.

The defendant's counsel requested the court to charge: "That if the jury believed that the defendant had peacable and uninterrupted possession of the slaves for more than six

years before the commencement of the action, claiming them as the property of his children publicly and notoriously for that time, the plaintiff could not recover;" which charge the court refused. The defendant's counsel then requested the court to charge: "That the public and notorious possession of the property was sufficient to furnish a reasonable and *prima facie* presumption of notice;" whereupon the court charged: "That where the possession of property is acquired, and held for a time, in subordination to the title of another, to render it adverse there must be a disclaimer of the original title, and an actual hostile possession of which the owner had notice, or which is so ostensible and notorious, as to furnish a reasonable or *prima facie* presumption of notice."

The jury returned a verdict for the plaintiff; and a motion for a new trial was made by the defendant, on grounds going to the competency of one of the jurors who tried the case, which motion was overruled.

The ruling of the court in rejecting the evidence offered, the charges given, the charges refused, and the overruling of the motion for a new trial, are now assigned for error.

JOHN T. TAYLOR, for plaintiff in error:

The statute of this State declares, that the action of detinue cannot be maintained, unless it is brought within six years after the right accrues. Bailors are not exempt from this statute. The only question in this case is, did the plaintiff's right to the action accrue more than six years before he brought it? If the negro had been loaned indefinitely to Benje, or if hiring had been for an indefinite period, or until demanded, then it would have been a continuous bailment, and the statute would not have commenced running. But this case is very different. Detinue could have been brought by Creagh the next day after the hiring expired in 1837. No demand or notice was necessary. The court erred, therefore, in charging that the statute did not commence running until demand and refusal. 4 How. (Miss.) 204; 12 Ala. 135; 13 ib. 370; 5 Barb. S. C. R. 393.

2. Up to 1837, plaintiff was constant in renewing his notes and demanding a recognition of his claim; from that time, for more than thirteen years, not a word is heard from him,

though the parties knew each other's residence, and must have seen each other every year. No note taken as before; no rent or hire paid; never rendered in by Creagh as his property, or taxes paid by him; no claim in any form. On the other hand, Benje, from that day, seems to have changed his character of holding; never admitted to any one the right of plaintiff. On the contrary, according to Godbold's testimony, held under his children, publicly and on all occasions, with the deed to his children on record all the time in the county where Creagh lived. Now, I contend, that at common law, independent of the statute, his claim had become too stale for recovery. The jury would have the right to presume a subsequent arrangement and purchase by Benje. It is said, in 10 Mass. 119, suppose a demand was necessary, there must be some end to the right of demand. One cannot be allowed to rest for an unreasonable time, until the defendant's evidence is destroyed, and then spring the claim upon him. 5 Barb. S. C. R. 393.

3. The exclusion of the testimony offered by defendant, (under any view of the case,) was clearly wrong. If it was publicly and notoriously known in the neighborhood where Benje lived, that he was claiming the negroes independent of Creagh, for so many years, added to Creagh's own silence during the time, and the other evidence of defendant, it would go far to show that the claim was honest, and the character of bailor and bailee had ended. Besides, it is the very kind of evidence alluded to as sufficient in 16 Ala. 167.

The court's charge in the first instance was erroneous, in requiring us to prove by necessary and certain evidence, that Creagh had knowledge of Benje's adverse holding, when *prima facie* evidence, or evidence sufficient to raise a reasonable presumption of the fact, was enough. And, under all the facts as they were before the jury, the charge asked by the defendant was proper, and ought to have been given.

JOHN A. CAMPBELL, *contra:*

The fidelity which is exacted of a tenant of lands to maintain the title of his landlord, applies with equal force to the hirer of personal property. He cannot set up an adverse title to the owner, from whom he derives possession. Story

Bail. § 450; 4 Mylne & Cr. 178; 7 Bing. 339; 2 B. & C. 540.

2. No length of possession will destroy the title of the owner. 1 Dev. 466; 3 Ired. 210.

3. The possession must be adverse, to entitle the hirer to set up title under the statute of limitations. 3 Ired. *supra;* 4 Georgia R. 75; 9 U. S. Dig. 326, § 140; 16 Ala. 167.

4. The evidence of reputation, and the conclusions and acts of officers, were not admissible in evidence.

It was competent to show acts of Benje indicative of ownership and declarations by him; provided those were of a nature to reach the plaintiff. The omissions and non-feasance of officers, with an inquiry into the motives of their conduct, are inadmissible. 8 Ala. 650.

GOLDTHWAITE, J.—The action of the court below in refusing to grant a new trial cannot be reviewed in this court. Spence v. Tuggle, 10 Ala. 538.

As to the argument that the right of action accrued at the termination of the hiring, there can be no doubt that a bailor, parting with the possession of his slave for a limited time, has the right to resume the possession of his property at the termination of the bailment; and we think also, that the general rule in cases of hiring, where there is no stipulation to the contrary, requires the hirer to return the slave on the determination of his term. Story on Bailments, § 414. But this rule is far from being universal in its application, and may be varied by the character of the contract, or other circumstances showing that such was not the intention of the parties. Where the rule does apply, and the hirer, instead of performing the duty devolving upon him, retains the property, the bailor may either treat the bailment as ended, and bring his action; or, where the hiring is from year to year, or a less term, he may consider the bailment as continuing or renewed; and in this class of cases, the question as to whether the bailment continues, is for the jury to determine, upon the facts before them. These conclusions are based upon the analogies of the law, as regulating the relation of landlord and tenant, (Schuesler & Donnell v. Ames, 14 Ala. 600; 16 ib. 73,) the only difference being, that the holding over of the tenant, in cases where it has the effect of renewing the lease,

operates *presumptio juris*, and in case of a bailee, as a circumstance the weight of which is to be determined by the jury. If the holding over was permissive, then, as the gist of the action of detinue is the *wrongful detention* of the property, it follows that the action could not have been maintained, so long as this species of possession continued.

As the character of the possession of the plaintiff in error to the slaves in question was properly in issue, evidence conducing to establish the fact that he held them as the property of his children was admissible, and his own declarations to that effect might legitimately have been offered; but this fact could not be proved by general reputation, and still less by the opinion of individuals as to the actual condition of the property; and there was, therefore, no error in the action of the court, in rejecting evidence of this character.

Neither are we able to perceive any error in the charge, "that the defendant below should have either disavowed to the plaintiff's intestate that he held under him, or that his possession should have been so notorious as necessarily to have put him on his guard." The whole doctrine of adverse possession rests upon the presumed acquiescence of the party against whom it is held; and, if inference and presumption could be resorted to, the right in many cases would be lost without the knowledge that it was usurped. In all cases, therefore, where the fact of adverse possession is involved, it is required on the part of the person so claiming, to manifest the character of his possession by acts which, if brought to the knowledge of the opposite party, would clearly show him that the possession asserted was hostile to his own, Angell on Limitations, 427, and cases there cited; and we do not understand the language used by the court, upon a fair construction, to mean anything more.

Neither was there any error in refusing the charge, that the peaceable and uninterrupted possession by the plaintiff in error of the slaves for six years before the commencement of the suit, claiming them publicly and notoriously, for that length of time, as the property of his children, would entitle him to a verdict. The evidence tended to show that the possession was held in subordination to the intestate of the defendant in error, and in that case the rule is, that the know-

ledge of the character of the possession which is relied on, must be brought home to the party under whom the possession was acquired. Angell on Limitations, 481; Whaley v. Whaley, 1 Spears 225; Ripley v. Yale, 3 Wash. (Verm.) 220. This being the law, and the charge requested assuming that the notoriety of the claim of the plaintiff in error operated necessarily as notice to the intestate, it was properly refused.

So also, in relation to the instructions requested, that the public and notorious possession of the property was sufficient to furnish a reasonable and *prima facie* presumption of notice. The character of the possession was a fact to have been submitted to the jury, and it was for them, and not for the court, to determine the weight which should be attached to it, in establishing notice to the intestate of the defendant in error; and the charge, in connection with the refusal of those instructions, was certainly as favorable as the rules which have been laid down by this court entitled him to.

The judgment is affirmed.

EWING *vs.* SANFORD.

1. In actions for malicious prosecution, two things are essential to be established by the plaintiff: first, the absence of all *probable cause* for such a prosecution on the part of the defendant; and secondly, that the prosecution was malicious.
2. The defendant may successfully defend, by showing either that there was probable cause for the prosecution, or, admitting that there was not probable cause, that he had not been actuated by what the law terms malice.
3. No matter how far a man may be impelled by malice, in prosecuting another on a criminal charge, the law, from motives of public policy, will hold him harmless, when sued for a malicious prosecution, provided he can show probable cause.
4. On the other hand, if he cannot show probable cause, the law will imply malice from the absence of probable cause, unless he can show, by way of repelling this implication, that such facts and circumstances existed, as, although not amounting to probable cause, were calculated to produce at the time, in the mind of a prudent and reasonable man, a well grounded belief or suspicion of the party's guilt; and that he was not, therefore, actuated by malice, in commencing the prosecution.
5. The refusal to give a charge in the precise language asked by counsel, is not

error, provided the charge that is given is a full and fair exposition of the law,

6. E. prosecuted S, for stealing a slave, which S. afterwards recovered from E. in an action at law; and after the termination of the prosecution, S. brought an action on the case for malicious prosecution against E. *It was held:*
That the record of the suit for the recovery of the slave was admissible evidence for the plaintiff.

7. In case for malicious prosecution, it was consented, at the close of the trial, that the clerk might receive the verdict; during the recess of the court, the jury returned their verdict to the clerk as follows: "We, the jury, find for the plaintiff, and assess his damages at $2,500," and requested him to have it put in proper form by the court, if it was not correct, after which they were discharged for the day, and separated; the jury were in court the next morning, and renewed their request to the court, whereupon the court, against the defendant's objection, directed the verdict to be entered in proper form. *Held:*
That there was no error in the alteration of the verdict.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

This was an action for a malicious prosecution brought by Sanford against Ewing. The prosecution instituted by Ewing against Sanford, was for the larceny of a slave, a woman named Eliza.

The evidence of the cause showed, that the negro woman Eliza had been levied upon as the property of T. Sanford. James Sanford, the plaintiff, was present at the sale, and forbid the sale, and gave notice that he should claim and hold the said slave, as his property, notwithstanding the sale. The defendant bought the slave at said sale, and placed her with one Carmelick. Plaintiff got her out of the possession of Carmelick without violence.

Defendant consulted several attorneys, before he made the oath for the arrest of the plaintiff on the charge of larceny, and, by most of them, he was dissuaded from making the oath, though, as to the counsel given him by one of the attorneys, the testimony was conflicting.

The plaintiff was committed to prison on the charge by a justice of the peace, and was discharged the next day, on *habeas corpus*, by a Judge of the Circuit Court.

A. McKinstry, Esq., an attorney at the time the affidavit was made by defendant, and who had been consulted by him, was asked by defendant, on cross-examination, "if he did

not tell the defendant that the plaintiff had no title to the negro, and that she was subject to the execution under which she was sold?" The witness answered affirmatively. To rebut this evidence, and to show that the plaintiff had title to said slave, the plaintiff introduced the record and judgment of a suit in the Circuit Court by plaintiff against the defendant for this slave, in which plaintiff recovered, which judgment was rendered subsequent to the arrest, and after the slave had been delivered by the justice to the defendant. To the admission of this record, defendant excepted.

Testimony was introduced by defendant, conducing to show that the slave was not the property of the plaintiff at the time of the sale, but was then subject to the execution against T. Sanford. He proved that plaintiff refused to make claim, and give bond for the trial of the right of property under the statute, and that the slave was found at the house of the plaintiff after she was taken from the possession of Carmelick. He also introduced evidence conducing to show that he was advised to the course he pursued in making the affidavit by competent legal counsel, to whom the facts and circumstances of the case were fully stated. There was, also, testimony that he was dissuaded by other counsel.

The court, after giving certain instructions to the jury, on the subject of malice and probable cause, and the measure of damages, was requested, by the counsel for the defendant, to instruct the jury as follows: "That if defendant believed, at the time he made the affidavit, that the conduct of Sanford, forming such ground of accusation, amounted to the offence charged, then this action cannot be sustained, and they must find for the defendant." This the court refused as asked, but gave it with this qualification, "that if they found that the defendant, not being a lawyer, had first advised with a lawyer, and, on a fair and honest statement of the facts to him, he had founded his belief upon the counsel or advice the lawyer had given him, then, if he believed the facts amounted to a larceny, he would be justified, and the plaintiff could not recover." To the refusal and to the charge as given, defendant excepted.

Counsel for defendant further asked the court to charge: "That although Ewing, in this action, may not be able to

show probable cause for prosecuting Sanford, or Sanford may show a state of facts from which the want of it is inferable, yet, if the defendant acted under an honest belief that the plaintiff was guilty of the offence charged, plaintiff cannot recover." This the court refused, but gave it with the same qualification as the last.

The court was asked to charge: "That if the jury found that the magistrate, before whom the plaintiff was brought, upon hearing the evidence *pro* and *con*, bound over the plaintiff to answer the charge on which he was arrested, that this was *prima facie* evidence of probable cause." This the court refused.

One charge given by the court was in these words: "If they (the jury) found that the defendant had prosecuted the plaintiff without probable cause, and with malice, either express or implied, then the plaintiff was entitled to a verdict, and the defendant was guilty as charged; and the jury must make him pay for the wrong he has done."

The parties consented, at the close of the trial, that the clerk might receive the verdict. It appeared that the jury, during the night, had rendered to the clerk the following verdict: "We, the jury, find for the plaintiff, and assess his damages at $2,500," and had made of the clerk a request that the same might be put in proper by the court, if it was not so. The next morning the jury were in court, and renewed the request to the court. The defendant's counsel objected, that there was no such verdict as would authorize a judgment against the defendant; but the court directed the clerk to alter the verdict so as to make it read as follows: "We, the jury, find the defendant guilty, and assess the damages at $2,500," defendant's counsel objecting. It appeared that the jury, after rendering their verdict the night before, had been discharged for the day, and separated.

The charges aforesaid, and the refusal to charge as requested, and without qualification, and the alteration of the verdict aforesaid, are assigned for error.

BOYLES, for plaintiff in error:

1. McKinstry was asked by defendant's counsel, whether he, as the professional adviser of Ewing, did not tell him,

before the arrest was made, that James Sanford had no title whatever to the negro woman, Eliza; to which he replied, that he did. This was entirely competent, as tending to rebut the presumption of malice, and was elicited for no other purpose. To rebut this evidence, the court permitted the plaintiff to read to the jury the record of the suit had between the parties subsequent to the arrest, for the recovery of the slave. This testimony was wholly irrelevant, and calculated to mislead the jury, and should have been excluded. 1 Saunders' Pl. and Ev. 491; 1 Dana, 14; 3 Peters, 320; 4 Litt. 272; 11 Mass. 140; 7 S. & R. 156.

2. The court erred in the charges given and refused. If the magistrate before whom the plaintiff was brought, after hearing all the evidence *pro* and *con*, bound him over to appear at the Criminal Court to answer the charge, this was *prima facie* evidence of probable cause; and the court should have so charged, on defendant's request. 4 Wend. 591; 4 Munf. 462; 14 Maine, 362; 22 ib. 212; 2 Dev. & Bat. 492; 15 Mass. 243, and cases there cited. The next two charges requested by defendant's counsel, should have been given as asked. They are in the precise language employed by this court in 11 Ala. 916; which was re-affirmed in 17 ib. 28. Good faith and an honest belief imply the absence of malice. 17 Ala. 28; 19 ib. 321; 1 Mees. & W. 583; 1 Hals. 166; 2 Munf. 23; 6 Bing. 183; 4 Ired. 382; 5 S. & R. 438.

3. The court erred in altering the verdict after the jury had been discharged. 7 Por. 218; 6 Mass. 1; 10 Shep. 316; 3 Ala. 359; 1 Mis. 401; 1 Stew. 36; 1 Branch, 189; 3 Blackf. 256; 11 Ohio, 482; 7 Hals. 252. After a verdict is received and recorded, and the jury dismissed, they cannot alter it on the ground of mistake. 16 S. & R. 414; 1 Texas, 50; 9 Ired. 28; 2 Greenl. 37, and cases there cited.

JOHN A. CAMPBELL, *contra:*

1. The judgment for Sanford against Ewing was competent in every aspect of the case.

Sanford declares that the accusation was false. The proof that the slave was his, establishes the allegation.

2. The first charge asked, which is complained of, makes the belief of Ewing the criterion upon which an accusation is

to be founded. If he believes it, according to this prayer, that is enough. No authority goes to the extent.

3. The next charge, which only differs from the other, makes it depend upon the honesty of the belief. An honest belief is a very equivocal term.

The law is, that probable cause must exist, and without it, malice is to be inferred.

4. Now, malice is to be rebutted by proof that the party adopted all the precautions which prudent men adopt before performing an act of responsibility, viz: taking counsel of competent men, who, upon hearing all that he has said, have advised his proceedings. If he has not done this, his act is hasty, ill considered and tortious, and, therefore, malicious. His hasty, ill considered and tortious act is, in point of law, malicious. The act has been shown to be without probable cause; that is, without a reasonable foundation. Here is evidence of hurry, inconsiderateness, recklessness and improvidence.

In the case before the court, there is a distinct finding by the jury that he did not act under, but against the advice of counsel. This finding is conclusive upon the subject of malice. This was a direct issue. as is shown by the evidence.

PHELAN, J.—It nowhere appears that the charge of the judge, in which he told the jury, that if they found the defendant guilty as charged, "they must make him pay for the wrong he had done," was excepted to. There is nothing in these words but a sound principle, at all events. The counsel commented on the manner of the judge saying it was angry and menacing. There is nothing in the bill of exceptions or in the words themselves, that gives any indication that the manner of the judge was wanting in moderation or propriety, if we even had power to take notice of that.

The court was requested to charge, "that if defendant believed at the time he made the affidavit that the conduct of Sanford, forming such ground of accusation, amounted to the offence charged," they, the jury, must find for the defendant.

In actions for malicious prosecution, two things are essential to be established by the plaintiff: 1. The absence of all probable cause for such a prosecution on the part of the defendan ; 2. That the prosecution was malicious.

The defendant may successfully defend, by showing, either that there was probable cause for the prosecution, or, admitting that there was not probable cause, still, that he had not been actuated by bad motives, or what the law terms malice.

Wherever, in actions of this class, the defendant, although unable to show a state of facts sufficient to establish the truth of the accusation which was preferred against the plaintiff, is nevertheless able to bring forward such a state of facts and circumstances, as were calculated to induce, in the mind of a reasonable and prudent man, a well-grounded belief of the guilt of the party, this will be sufficient for his protection. To hold men to more than this, would so greatly discourage prosecutions, that the public good would suffer for the want of seasonable cooperation upon the part of private individuals, in aid of the public authorities, in suppressing crime.

Malice is either express or implied; express, when evinced by threats, old grudges, &c.; implied, when we can find no good or justifiable motive for an act calculated to do harm to another. When we can find no good or justifiable motive for an act calculated to do injury to another, we imply necessarily a bad motive, or malice.

No matter how far a man may be impelled by malice in prosecuting another on a criminal charge, provided he can show probable cause, the law, from motives of public policy, will hold him harmless, when sued for a malicious prosecution.

On the other hand, if he cannot show probable cause, the law will imply malice, from the absence of probable cause, unless he can show, by way of repelling this implication, that such facts and circumstances existed, that, although not amounting to what is called probable cause, they were calculated to produce at the time, in the mind of a prudent and reasonable man, a well-grounded belief or suspicion of the party's guilt, and that he was not, therefore, actuated by malice, in commencing the prosecution.

In Chandler v. McPherson, 11 Ala. 916, the court say, that "if the defendant acted under an honest belief that the plaintiff was guilty of the offence with which he was charged, no recovery can be had against him." In the subsequent case of Long v. Rodgers, 19 Ala. 321, this honest belief is explained, and declared to be, not "a belief founded in the ca-

price, prejudice, or idle dreams of the prosecutor, in the absence of all facts and circumstances which would generate such suspicion of guilt in the mind of a reasonably prudent man," but a belief founded on facts and circumstances which, although not amounting to probable cause, would yet induce, in the mind of a reasonable and prudent man, so serious a suspicion of the party's guilt, as to repel effectually the idea that he acted from malice in prosecuting him. See also, Ewing v. Sanford, 19 Ala. 605. The charge requested of the court falls short of this, by making the belief of the party alone, without further qualification, sufficient to exonerate him, and for that reason the court acted properly in refusing it. The charge that was given by the court as qualified, was going fully as far as the law would justify in favor of the plaintiff.

The refusal to give a charge correct in itself, in the precise words requested by counsel, is not error, if the charge given by the court on the point in question is a full and fair exposition of the law. A charge, correct in itself, may mislead a jury sometimes for want of fullness, simplicity or clearness of expression. It is true, a court may, and commonly ought, to give a charge which is correct in itself, though liable to any of these objections, in the very words that are proposed, and then add explanations afterwards. But this court has holden in a late case, and after careful consideration, that it was not error to refuse to adopt the very words of the counsel, provided the charge that was given was a full and fair exposition of the law; and that decision will be followed. Long v. Rodgers, 19 Ala. 321.

Thus, the charge that was asked, in which the court was requested to instruct the jury, that an "honest belief" of Sanford's guilt on the part of defendant, even in the absence of proof of probable cause, would be sufficient to excuse him, may be, strictly speaking, correct, if we interpret the word "honest" according to the signification put upon it in 19 Ala. 321. But the court was not bound to give it as the counsel asked it. It did not really contain within itself an instruction calculated to enlighten the jury fully. Had it been given as the defendant asked it, the court would have been bound, in order to prevent a probable misapprehension, to

have gone on and explained what was meant by an honest belief.

After having just before given an elaborate and correct charge on the subject of malice and probable cause, fully explaining and setting forth the principles of law applicable to the case, which the defendant suffered to pass without exception, the court was requested by the counsel for the defendant, to charge the jury, that if the magistrate, on the trial of the warrant, bound over the defendant to answer the charge, "that this was *prima facie* evidence of probable cause." This charge the court refused to give.

In view of the proof of the cause, and the charge already given, the court properly refused to enunciate, without further explanation, the principle, however correct abstractly considered, that was contained in the charge requested by the defendant. Without explanation, which the court was not bound to give, the simple enunciation of that principle would give it a seeming importance, more calculated to mislead, than to enlighten the jury. All the facts connected with the arrest of the plaintiff, his trial and commitment by the magistrate, and his subsequent discharge, were before the jury; and to charge as to the effect of the commitment by the magistrate merely, without reference to the other proof in the cause, would not have been proper.

The admission of the record of the suit between these parties, in which Sanford recovered of Ewing a judgment for the same negro woman which Ewing had prosecuted him for stealing, was proper, under any aspect of the case. To repel the truth of the charge preferred by Ewing, was one of the duties that devolved on Sanford under the allegations of his declaration, and there was no proof more proper for such a purpose, than a recovery of the very slave he was charged with stealing, in a suit against the person who preferred the charge, and to whom she had been delivered by the magistrate.

The last assignment relates to the alteration made in the form of the verdict by direction of the court. The verdict as rendered, was in substance the same, both before and after the alteration directed by the court. It was a correction as to matter of form only, and this the court may properly di-

rect at any time. In an action on the case, a verdict saying, "We, the jury, find for the plaintiff, and assess his damages at $2500," is equivalent to saying, "We, the jury, find the defendant guilty, and assess the damages at $2500." "We find for the plaintiff," is, in other words, "We find *the issue* for the plaintiff.

There is no error in the record, and the judgment below is affirmed.

CONNOLEY *vs.* CHEESBOROUGH.

1. To entitle a plaintiff in attachment to a judgment against a garnishee on his answer, it must appear that there is a debt due from the garnishee to the defendant in attachment; and should the answer disclose that the debt had been assigned before it was attached, then no judgment can be rendered against the garnishee without bringing in the assignee to contest his right to it.
2. The theory of a bill of exchange is, that the drawer has funds in the hands of the drawee, and by drawing a bill on the holder of such funds, he sells or assigns them to the payee: and if the drawee declines to pay on the ground that, since the drawing of the bill, the funds have been attached in his hands, and the payee fails or omits to have the bill protested, then the payee cannot be considered as having abandoned his equitable right to the fund, and should be preferred to the attaching creditor, in a contest at law.

ERROR to the County Court of Mobile.

A. C. Cheesborough was summoned, on the 18th day of April, 1849, as a garnishee at the suit of James Connoley, to answer what he was indebted to Joseph W. Furniss. The garnishee answered that he owed Furniss $386\frac{45}{100}$, but that on the 1st of April, 1849, he had received a letter from Furniss, informing him that he had drawn a draft on him, in favor of Wingate & Breman, for $395. The draft was presented for payment after the service of the garnishment, but was not paid for the reason that the debt had been attached in the hands of the garnishee, who submitted to pay it as the court might direct. It did not appear that the bill had been protested, either for non-acceptance or non-payment. The court discharged the garnishee, and the plaintiff in attachment brings the case to this court by writ of error.

PHILLIPS and BOYLES, for plaintiff in error:

In those cases where a garnishee answers that he has been notified that the note given by him has been transferred, it is upon the ground that there is a legal liability outstanding against him. In this case, it would appear to be a mere direction on the part of the owner of the fund, for the bill was never presented until after attachment. Baker v. Moody, 1 Ala. 315.

In this case the bill was drawn for a larger sum than was due; the drawee was not bound to accept, nor was the payee bound to receive the acceptance, if it had been offered. Mandeville v. Welch, 5 Wheat. 289; 20 Pick. 15.

JOHN A. CAMPBELL, for defendant in error:

The question presented in this case is, whether a draft drawn upon the balance of an account due from a debtor, with a letter to the debtor, notifying him of the amount of the account and the draft upon him, before the service of a summons of garnishment, is such an assignment to the payee of the draft, as will countervail a garnishment legally served after the date and reception of the letter, before the acceptance of the draft.

We hold, on behalf of the garnishee, that it is.

The attaching creditor is not entitled only to the sum that is legally and equitably due to the defendant of the judgment. If the draft and the letter together amount to an assignment of the fund, the creditor is not entitled. A court of law will protect the rights of an equitable assignee. Chitty on Bills, 8, and note; 9 Porter 98; 4 Ala. 333.

The facts stated in the answer and the letter, show an equitable transfer of the debt in the garnishee's hands.

The bill standing alone would have this effect; with the letter to the drawee, there can be no question. Chitty on Bills 310, note p; 4 Mylne & Craig, 690; 4 Wash. 424; 20 Ver. Rep. 25; 7 Ired. 438; 8 Hump. 654; 3 Price 58; 6 Ala. R. 690.

DARGAN, C. J.—To entitle a plaintiff to a judgment against a garnishee upon his answer, it must appear that there is a debt due from the garnishee to the defendant in attach-

ment; and should it appear from the answer that the debt had been assigned before the process of garnishment was executed, and the assignee is not called in to contest his right thereto, as he may be under our statutes, then no judgment can be rendered against the garnishee. Foster, Nastraud et al. v. Walker, 2 Ala. 117; Fortune v. The State Bank, 4 ib. 385; 6 ib. 836.

The sole question in this case, therefore, is, whether we can consider the drawing of the bill by Furniss on Connolley, in favor of Wingate & Breman, as an assignment of the debt that was due from Conolley to Furniss. The theory of a bill of exchange is, that the drawer has funds in the hands of the drawee, and by drawing the bill, he sells or assigns such funds to the payee, or such part thereof as amounts to the sum specified in the bill. Story on Bills, § 13; Chitty on Bills, 360, note; 6 Wheat. 277. It is true, that to give the payee a legal right of action against the drawee, he must accept or agree to pay the bill; and if the bill or draft be for only a part of the funds in the hands of the drawee, then the assignment cannot be considered as complete until there has been an acceptance or an agreement to pay. Chitty on Bills, *supra*, and cases there cited. But when the bill is for the entire amount in the hands of the drawee, it has been held, that the drawing of the bill is an assignment of the funds, and, after presentment, the drawee cannot legally part with such funds against the consent of the payee. Peyton v. Hallett, 1 Caines, 379; Cutts v. Perkins, 12 Mass. 206. If, however, this last proposition be incorrect, and if it should require the assent of the drawee to perfect the assignment, even when the bill is for the whole amount in the hands of the drawee; still, in the case before us, I should hold the assignment complete, at least in equity, for the drawee does not deny the right of the drawer to draw the bill, and the only reason why he has not paid it, is, that the debt has been attached in his hands since the draft was drawn. Nor does it appear that the payee has protested the bill, or given notice of non-payment to the drawer. Under these circumstances, and as the garnishee submits, by his answer, to pay the amount to him who in law is entitled to it, we think it clear that the payees of the bill must be preferred to the attaching creditor. They have

looked to no other source for payment, and, therefore, have not abandoned their equitable right to the fund, which must be considered as complete under the circumstances disclosed by the answer of the garnishee.

We place our judgment, in this case, upon the particular facts, but I should be willing to hold, if necessary, that when the bill is for the entire amount in the hands of the drawee, and the payee does not have the bill protested, but looks to these funds alone for payment, a court of equity would consider the drawing of the bill as an assignment of the fund, and would compel its payment. It is not, however, necessary to decide this at this time, as the particular facts of this case make out a clear and unquestionable assignment of the fund.

Let the judgment be affirmed.

PEARSON, ET AL. *vs.* DARRINGTON, ADM'R.

1. The doctrine of relation back to a past time is a fiction which is often indulged, in advancement of justice, to sustain legal proceedings; but it is never resorted to, when the result would be, to deprive a party of a clear legal right, or when it would work manifest injustice.
2. The statute which limits appeals from an interlocutory decree dissolving an injunction, "*to the next term* of the Supreme Court," means, *the next term to which an appeal may be taken according to the general law regulating appeals.*
3. Such appeals are, in other respects, subject to the same rules which govern appeals in other cases, and unless the decree is rendered a sufficient length of time before the commencement of the first term of the Supreme Court, to enable the appellants to give the citation required by the statute in cases of appeals and writs of error, the appeal is properly returnable to the next term of the court to which it may be returned, allowing to the appellants time to give the required notice.
4. Where the regular term of the Chancery Court commenced on the first Monday in December, and was limited to one week, and a cause was submitted on a motion to dissolve an injunction, with the agreement of the counsel that the Chancellor should render his decree in vacation as of that term, and a decree dissolving the injunction was afterwards rendered, dated the 3rd of January, but not filed in the office of the register until the 10th of January, *Held:* That an appeal from this decree was properly taken to the next June term of Supreme Court.
5. When the settlement of an estate has been removed from the Court of Probate into the Court of Chancery, by a bill regularly filed, and the latter court has

rightfully taken jurisdiction, and the defendant has answered the bill, and the cause is progressing in the equity form, the administrator, pending such suit, proceeds in the Court of Probate at his peril, and is liable to have his acts reviewed; and any rights which he may acquire by reason of the action of the Court of Probate, may be divested by the Court of Chancery, if such rights in any wise conflict with, or embarrass the proper administration of the estate in equity.

6. Where the settlement of an administration is withdrawn from the Orphans' Court, by a bill filed in the Court of Chancery, and the cause is progressing in the latter court, it is competent for that court, if the exigencies of the estate require it, to direct, by interlocutory decree, a sale of the slaves belonging to the estate, for cash, at an unusual season of the year for selling such property, upon the petition of the administrators or of the creditors; and this, even before an accounting is had between the administrator and the complainants.
7. And if, in such case, the administrator invokes the aid of the Orphans' Court, and obtains an order of sale, and purchases the slaves sold for himself, it is the duty of the Court of Chancery, to provide that the slaves so purchased by him shall be forthcoming to abide the final decree in the cause.
8. If an administrator, pending a suit in equity for the settlement of the estate, pays demands against the estate, and seeks to indemnify himself, by selling the property, under an order of the Orphans' Court, and purchasing it himself; or, if he has extinguished demands by giving his individual obligations, which have been reduced to judgments, and he seeks, by a purchase of the property, to invest himself with the title, so as to make it subject to levy; in either event, the Court of Chancery will hold the property subject to its control, to abide whatever decision the justice and equity of the case may require to be made on the final hearing.

APPEAL from the Chancery Court of Dallas.
Tried before Hon. W. W. MASON.

This bill was filed by the plaintiffs in error, against the defendant, as the administrator with the will annexed of William Matherson, deceased, to recover certain legacies which were bequeathed by said testator to Maria Pearson, one of the complainants, and for an account and settlement of the administration. A supplemental bill was afterwards filed, which alleges, that after the filing of said original bill, said administrator petitioned the Orphans' Court of Clarke county for a sale of the personal property of said estate, for the purpose of paying off outstanding liabilities of the estate; that said Orphans' Court granted said order of sale, and authorized said John Darrington "to sell at public auction for cash fifty negroes, more or less, as the demands of the estate might require, with a view to the interest of the same ac-

cording to law;" that said sale was accordingly afterwards had, and said administrator himself purchased all of said negroes except three; that said purchase was made by collusion between the administrator and the auctioneer, and the slaves knocked down at less than their value. The bill also charges, "that the said Jacob Pearson, one of your orators, is informed, and he fears and believes the information to be true, that the said John Darrington intends, either to send said slaves he so pretended to purchase out of this State, and to be sold by him, or to point them out to the sheriff or marshal as his property, and to be sold under execution against him, as the security of Mrs. Maria Matherson, the widow of said William Matherson; either of which actings by the said John Darrington would go to the great wrong, damage, and injury of complainants."

The bill prays, that said purchase by the administrator may be declared void, and that he may be enjoined from selling or removing said slaves, or causing them to be sold by the sheriff as his property; and the injunction was awarded.

The administrator, in his answer, admits the sale under order of the Orphans' Court, but insists that it was conducted fairly, and without any fraud or collusion, and that all the negroes purchased by him brought more than their full value. As to the charge that the defendant intended either to send said slaves out of the State, or cause them to be levied on as his property, the answer is silent, neither admitting nor denying it. Other matters are set up in the answer, but it is not deemed material to notice them.

The Chancellor dismissed the bill, for want of equity; but his decree was reversed by the Supreme Court, at the June term, 1850, and the cause was remanded for further proceedings. Se 18 Ala. Rep. 348. At the December term of the Chancery Court of Dallas, held on the first Monday in that month, 1851, the defendant moved to dissolve the injunction, on his answer, and for want of equity in the supplemental bill; and, by the written consent of counsel, it was agreed, that the Chancellor should render his decree in vacation, as of that term. The Chancellor dissolved the injunction; from which order the complainants prayed an appeal, and moved to re-instate the injunction. The appeal was granted, and the

injunction was re-instated until the decision of the Supreme Court upon the appeal should be made. The decree dissolving the injunction is dated January 3, 1852, but it appears from the endorsement of the register, that it was not filed in his office until January 10, 1852. The record was not filed in the Supreme Court until the June term, 1852, and the appellee now moves the court to dismiss the appeal, because it was not brought up to the January term, 1852. The case is at the same time submitted, on the errors assigned by the appellants, viz: the decree of the Chancellor dissolving the injunction on the supplemental bill.

WILLIAMS & COCKE, for appellants:

1. Injunction can only be dissolved on denial of the equity, charged in the bill.

2. An administrator or executor, being a trustee, cannot purchase the trust estate at his own sale.

3. Before purchase by an executor at his own sale of the trust estate can be sustained, the executor must show, by proof entirely satisfactory to the court, that the sale and purchase was fair, and *bona fide*. McCartney, et al. v. Calhoun, 17 Ala. 303.

4. The order of the Orphans' Court for Clarke county, allowing the sale for cash of fifty slaves, or more, by the executor to pay debts, is void, and confers no power to sell. Act of Assembly, 1847–48, page 124, No. 65. Such sale could only be valid when on a credit of at least six months. Clay's Dig. 223–224, § 13.

5. Where chancery has assumed jurisdiction over the acts of an executor or administrator, in settlement of his accounts, the Orphans' Court is ousted of jurisdiction, and an order for the sale of personal property afterwards by the Orphans' Court, either for cash or credit, confers no power on the executor or administrator to sell; and, therefore, such sale and purchase by him of the slaves of the estate is void. In such case, chancery will order a sale. Wilson and wife v. Crook, et al., 17 Ala. 59.

6. A sale by executor or administrator of the slaves of the intestate in June and July, for cash, and purchase by himself, is fraudulent and void; and this especially, where the

slaves are not removed from the plantation, but permitted to remain there and work after the sale same as before; and this more especially, when no cash is paid by the executor, and he pretends to have sold to refund to himself for moneys advanced by him to the estate.

BELSER & RICE, *contra:*

1. An appeal from an interlocutory decree dissolving an injunction, must be taken before the Chancellor, and is precisely the same as if the decree was made in term time. Griffin v. Br. Bk. at Huntsville, 9 Ala. 201.

2. In this case, under the agreement of the facts, the decree rendered on the 3d January, 1852, is to be taken as of the term (December term, 1851) when the cause was submitted on the motion to dissolve the injunction. And as the December term, 1851, of Dallas Chancery Court, by the act of 1848, commences on the first Monday in December, and is limited to one week, the decree must be taken as one rendered early in December, 1851.

3. But even if taken as a decree rendered on the 3d day of January, 1852, the appeal is barred, because of the failure of the appellant to file the transcript and appeal during the January term, 1852. Clay's Dig. 357, § 80.

4. Under the statute allowing the appeal, the appellant was entitled to the whole of the January term, except the last day thereof, to file the transcript and bring the appeal to a hearing. But as he failed to file the transcript during the term, his appeal expired with that term.

5. When the time to prosecute an appeal, or for any other purpose, is prescribed by the rules or practice of the court, it may be enlarged by the court upon good cause shown. But when the time for the prosecution and determination of an appeal is fixed by the statute, it is unbending, and cannot be enlarged. The court possesses no dispensing power. Jackson v. Wiseburn, 5 Wend. 136: Caldwell v. Mayor, 5 Paige, 572; Munson v. Cage, 1 Martin's Rep. (N. S.) 573; 1 Humph. Rep. 60; Cook v. United States, 1 G. Green's (Iowa) Rep. 39; 1 Smedes & Marsh. 657.

6. The register has no lawful authority to mark on a decree the time when it was filed. His unauthorized endorsement cannot vary the date of the decree itself.

7. No notice of an appeal from an interlocutory order dissolving an injunction, is required or authorized by the act which allows the appeal. The statute regards both parties as present when the appeal is taken, and charges them with notice. And herein is a striking difference between a writ of error and an appeal from such interlocutory decree. "The next term of the Supreme Court," as used in the statute allowing the appeal, is the term which begins next after the day on which the decree is rendered by the Chancellor. The plain object of the statute is a speedy trial of the appeal.

8. The date of such decree is conclusive evidence of the day on which it was rendered, and cannot be varied by any evidence in the appellate court. Bishop's Heirs v. Hampton, 19 Ala. 792; Metcalf v. Metcalf, ib. 319; Saltmarsh v. Bird, ib. 665; Ansley v. Robinson, 16 Ala. 793.

9. The supplemental bill is not authorized by the original bill and the rules of chancery practice. It joins as complainants persons who were not parties to the original bill, nor made parties by any amended bill. It relates to matters essentially different from those in the original bill, and incompatible with them. It embraces by its injunction some of, if not all, the property embraced by the injunction granted on the original bill, and dissolved before the filing of the supplemental bill. The supplemental bill ought to be repudiated by the court. Allen v. Mont. R. R. Co., 11 Ala. 437.

10. The answer denies the equity (if any) of the supplemental bill. The denial may either be direct or by setting up facts inconsistent with the averments of the bill.

CHILTON, J.—The motion made by Darrington to dissolve the injunction in the court below, was made at the December term, 1851, and the Chancellor, under the written agreement of the respective counsel, held the cause under advisement, with the permission of said counsel that the cause should be decided and returned in vacation. The Chancellor pronounced a decree dissolving the injunction, but upon the application of the complainants granted an appeal, and ordered the injunction to remain of force until the appeal should be tried by the Supreme Court, on the execution of a bond, which was duly entered into and filed.

This decree was dated the 3d of January, 1852, but the register's endorsement shows that it was filed on the 10th of that month.

It is contended on the part of the appellee, that this decree must be regarded as rendered during the first week in December, that being the period limited by law for the session of the Chancery Court of Dallas, and that, inasmuch as appeals from decrees dissolving injunctions are required to be taken to the next term of the Supreme Court after their rendition, this appeal, which was to the present June term, should be dismissed.

We cannot assent to the proposition, that the decree must be regarded as rendered during the December term, for the purpose of ascertaining the term of the Supreme Court to which an appeal from it would lie. The doctrine of relation back to a former period is a fiction which is often indulged in advancement of justice, to sustain legal proceedings; but it is never resorted to when the result would be, to deprive a party of a clear legal right, or when it would work manifest injustice.

Instead of allowing three years for taking an appeal from decrees of this kind, the statute limits the appeal to the next term of the Supreme Court. This means the next term to which the appeal may be taken, according to the general law regulating appeals; otherwise, to hold that the party was bound to appeal to a term of the Supreme Court which commenced before the decree was returned into the primary court by the Chancellor, would be to require an impossibility. Such was not the intention of the Legislature. We are quite sure that the law imposed no obligation upon the appellants to prosecute their appeal to the January term, 1852, of this court, as the decree was not handed in until after that term had commenced.

We are of opinion, also, that such appeals, with the exception of being made returnable to the next term of the Supreme Court, are subject to the same rules which govern appeals in other cases; and that unless the decree is rendered a sufficient length of time before the commencement of the term of this court, to enable the appellants to give the citation required by the statute in cases of appeals and writs of error, the said ap-

peal is properly returnable to the next court to which it may be returned, allowing to the appellants time to give the required notice. There is no repeal of the statute requiring citation in such cases, and the law does not favor the repeal of statutes by implication. The argument, that the party is presumed to have been in the court when the appeal was granted, and must be cognizant of it, would apply to all cases of appeal as well as this, and therefore proves too much.

The motion to dismiss the appeal must consequently be denied.

But we come next to consider the merits of the decree. When this case was before us at a previous term, from a decree dismissing the bill, we held, after due consideration of the provisions of the will of William Matherson, and the charges and allegations of the original bill (which, for the purposes of that trial, were considered as true,) that the bill contained equity, and presented upon its face such a case as justified the interference of a court of chancery to compel a discovery; and that, under the facts and circumstances charged, that was the appropriate forum to take an account of the numerous and complicated transactions growing out of the administration of the estate, and to enforce the due execution of the trust assumed by the administrator with the will annexed. Pearson et al. v. Darrington, 18 Ala., 348.

The effect of this bill, conceding it to be well filed, was, to withdraw the administration of the estate from the Orphans' Court, so that more complete justice might be afforded the complainants by its administration in the court of equity.

The supplemental bill charges, that notwithstanding the pendency of this proceeding in chancery, the administrator proceeded to petition the Orphans' Court of Clarke county, and obtained an order from said court for the sale of "fifty negroes, more or less, as the demands of the estate may require," to be sold at public auction for cash. It appears some fifty-seven of the slaves were sold, on the 17th day of July, 1848, all which were purchased by the administrator himself, except three. The bill charges, that "Jacob Pearson, one of the complainants, has been informed, and he fears and believes the information to be true, that the said John Darrington intends either to send the slaves he so pretended to purchase

out of this State and to be sold by him, or to point them out to the sheriff or marshal as his property, and to be sold under execution against him as the security of Mrs. Maria Matherson, the widow of the said William Matherson; either of which actings by the said John Darrington would go to the great wrong, damage and injury of the complainants." The answer, as to the charge of intended removal of the slaves beyond this State, is perfectly silent.

When the settlement of an estate has been removed into chancery by a bill regularly filed, and that court has rightfully taken jurisdiction, as we have already decided the court did in this case, and the defendant has proceeded to answer, and the cause is in progress in the equity forum, pending such proceeding, the administrator proceeds in the Orphans' Court at his peril, and is subject to have his acts reviewed; and any rights which he may acquire by reason of the action of such Orphans' Court, if such rights in anywise come in conflict with, or embarrass the proper administration of the estate in equity, may be divested by the latter court.

The Court of Chancery having rightfully obtained jurisdiction, will not permit either of the parties to oust its jurisdiction, or cripple or embarrass it in the proper exercise of its remedial justice, by any thing they may do in another forum. Applying these principles to the case before us: If the exigencies of this estate were such as to require a sale of the slaves for cash, at an unusual season of the year for selling such property, it was perfectly competent for the court of equity in which this bill was pending to have passed an interlocutory decree, upon the petition of the administrator or of the creditors, for the sale of the slaves; and this, even before an accounting was had as between the administrator and the complainants. But, inasmuch as such relief was not sought in said court, and the aid of the Orphans' Court was invoked, it was the duty of the Chancery Court so to provide, that the slaves purchased by the administrator under the order of the Orphans' Court should be forthcoming to abide the final decision in the cause. Otherwise, should it turn out upon the final hearing that the administrator had funds in his hands, or is properly chargeable with assets sufficient to indemnify him, or that there is any want of good faith in the purchase, the

court would not have it in its power to administer upon these slaves, as they may have been scattered or sold to other persons.

We do not wish to be understood as holding, either that the order under which this sale was made was void, or that the sale of the slaves under it was invalid. We express no opinion upon either, but leave the questions respecting them open for a decision upon the final hearing of the cause by the Chancellor.

All that is necessary for us to decide now is, that it is competent for the Chancellor to vacate the purchase made by the administrator, if it in any wise conflicts with the proper exercise of its remedial justice, is wanting in good faith, or the prices bid by him are not a fair equivalent for the property; and that to preserve its jurisdiction untrammeled, the injunction against the sale or removal of the property should have been continued. If creditors of the estate have obtained judgments against the administrator, the slaves belonging to the estate are of course liable to such judgments, as the injunction does not in any way affect their rights. But if the administrator has paid demands, and seeks to indemnify himself by selling and purchasing the property; or, if he has extinguished demands by giving his individual obligations, which have been reduced to judgments, and he seeks by a purchase of the property to invest himself with the title, so as to make it subject to levy; in either event, the court, which always narrowly scans the acts of trustees by which they attempt to acquire a title to trust effects in opposition to the *cestuis que trust*, should hold the property subject to its control, to abide whatever decision the justice and equity of the case may require to be made on the final hearing. This is alike due to the complainants, who aver that their interests have been injuriously affected, and to the administrator, who is charged with fraud in the acquisition of the title. See Waterman's Eden on Injunctions, 145–6, N. 1; and, as to purchases by trustees, 13 Ala., 681–704; 16 ib., 616–624.

We have looked into the objections taken to the bill, but see no sufficient reason in them for dissolving the injunction. After a careful examination of this case, we feel constrained to hold, that the Chancellor erred in dissolving the interlocu-

tory decree rendered. It is therefore reversed, and a decree here rendered re-instating the injunction.

LANG ET AL. *vs.* BROWN.

1. A distributee's undivided interest in an unsettled estate may be set apart in equity by his judgment creditor, and subjected to the satisfaction of his demand.
2. But in order to do this, it is indispensably necessary that the Chancellor should proceed to make a final settlement of the administration, and separate the portion of the judgment debtor from the remainder of the estate, before a final decree can be pronounced condemning such portion to the payment of the demand. To this end, the master should take just such an account of the affairs of the administration, as is required to be taken by the Court of Probate on the final settlement of intestate's estate; and when this is done, the Chancellor should direct the estate to be distributed among the parties in interest, in a manner as nearly conformable to that pointed out by the statute for the government of the Courts of Probate as is practicable, and then direct the sale of so much of the portion sought to be charged by the creditor as shall be sufficient to satisfy his demand.
3. When a reference is made to the master, and he disregards the instructions and directions of the Chancellor, or does not furnish in his report the facts necessary to enable the court to proceed to a final decree on the merits of the case, the report should be set aside, even if no exceptions are taken to it.
4. It is the duty of the master to obey the instructions of the Chancellor; and if it is desired that the Chancellor should review his directions, the party supposing himself to be aggrieved by this obedience of the master, may take exceptions, and by this means bring the point again to the attention of the Chancellor. If, on the argument of these exceptions, it should be made to appear that the justice of the case cannot be got at, without an alteration of the decree, in conformity with which the report is made, the Chancellor should direct the report to stand over, and order that portion of the decree containing the erroneous directions to be reheard.
5. It is not competent for the court, upon exceptions, to make an order inconsistent with the decree: from the time the decree is pronounced, all the subsequent proceedings should be consistent with it.
6. When the report of the master is in direct opposition to the original decree, an order of the Chancellor confirming it, may be reviewed in the Appellate Court, without exceptions to the report in the court below.
7. When a bill is filed by a creditor, to subject to the satisfaction of his judgment his debtor's undivided interest in her husband's estate, of which she is administratrix, and to set aside as fraudulent a deed conveying all her interest in the estate to her children, who were the other distributees, to which bill the widow, individually and as administratrix, and the other distributees are made parties defendant, a decree in favor of the complainant which directs "*the defendants*" to pay into court the amount of complainant's judgment, and execution to issue *against them* in default of payment, is erroneous.
8. The second head-note in Brown v. Lang et al., (14 Ala. 719,) corrected.

ERROR to the Chancery Court of Mobile.

Tried before the Hon. J. W. LESESNE.

The bill in this case was exhibited by the defendant in error against Mrs. Lang, in her own right, and as administratrix of Willis Lang, deceased, and the other defendants, as distributees, and heirs at law of said intestate. The object of the bill is three-fold; first, to procure a settlement of the estate of Willis Lang, so as to ascertain and set apart the share to which Mrs. Lang, his widow and administratrix, is entitled; secondly, to charge that share with the payment of the claim of the defendant in error, who is her judgment creditor; and thirdly, to set aside a voluntary deed made by Mrs. Lang to her children, conveying all her interest in her husband's estate to them.

The bill charges, that the value of the personal estate which came to the hands of the administratrix, is $13,000, besides a large and valuable real estate in the city of Mobile, and elsewhere; that the administratrix has made no settlement, but that the estate is ample to pay off all its debts, and leave a large sum for distribution; that complainant has obtained judgment against Mrs. Lang, and an execution on it has been returned, "no property found;" that, to avoid the payment of this debt, she has by deed conveyed to her children, the heirs of Willis Lang, all her right, title and interest in and to the estate of said Willis Lang, and that said deed is fraudulent and void. The bill further charges, that Mrs. Lang refuses to settle in the Orphans' Court, that the amount of her share of the estate may be ascertained. The prayer of the bill is, that she be required to state an account, and make settlement in the Court of Chancery; that her portion of the estate be ascertained, and by the decree of the court subjected to the payment of the complainant's demand, and that the deed to her children be set aside.

The defendants answer, denying that Mrs. Lang is in equity entitled to any portion of the estate, and alleging that she has wasted and misapplied the assets of the estate to the amount of upwards of $10,000, a sum exceeding the value of her distributive portion. They deny all fraud in making the deed to the children, and insist it was made in good faith

by Mrs. Lang, to indemnify them against loss from the waste of the assets by her as administratrix. To the answers, an account of the assets, expenditures, &c., of the estate under the management of the administratrix, is appended as an exhibit.

The Chancellor, on the first hearing of the case, held, that the lien of the distributees on the distributive portion of Mrs. Lang, arising out of their claim against her for wasting the assets of the estate, was superior to that of Brown, the defendant in error, and must be first satisfied, and offered the complainant an account, to ascertain if there would be any balance due to Mrs. Lang on her portion of the estate of her husband, after accounting to the children for her waste of the assets of the estate; but he declined setting aside the deed until such account should be taken.

The complainant prosecuted a writ of error from this decree to this court, where it was affirmed, and the case was sent back to the court below for further proceedings on the decree, under the leave given by the Chancellor.

After the case was returned to the court below, the master, upon notice to the parties, proceeded to act on the matters referred to him by the Chancellor, and reported at the April term, 1851. The order of reference, and decree accompanying it, are in these words: "It is ordered and decreed, that the master take an account of the estate of Willis Lang, deceased, and the amount of assets of said estate wasted or misapplied by Catharine Lang, the administratrix, and of the balance of debt against her, and in favor of said estate, and the value thereof she is entitled to as a distributive share of the same.

He will also take an account of any payments made by Willis Lang to the complainant, in bagging and rope, or otherwise, as stated in the answer. He will also take an account of the amount due the complainant on his said judgment."

In his report, the master states the sum due complainant to be, $\$1982\frac{79}{100}$, including interest to the date of his report; that the real estate left by Willis Lang was, at the time of his death, worth $8,000; his personal estate, $18,000; the rents and slave hire to the taking of the account, $5,000; making an aggregate of $31,000. He reports Mrs. Lang's portion to worth, $5,700.

The report does not show, that the master stated any account current between the administratrix and the estate, from the commencement of her administration to the time of taking the account, so as to show what was the true condition of the estate; he makes no inquiry as to the waste or misapplication of assets by the administratrix, nor does he strike the balence between her and the estate, as required by the order of reference. These portions of the order of reference are wholly disregarded.

The defendants filed exceptions to the action of the master, in taking and reporting the account. They are:

1. "Because, in ascertaining the value of the personal estate, of which Willis Lang died seized and possessed, the master disregarded the appraisement thereof, made by due course of law in the Orphans' Court, in evidence before him by the bill of complaint, and by the answers;

2. Because the master set aside and disregarded said appraisement, on the oath of one witness, who stated his knowledge of the value thereof to be slight;

3. Because the master allowed the said appraised value to be disputed by parol proof;

4. Because it was in proof by Dudley Hubbard, that when the said Lang died, he owed debts to a large amount, which had been discharged by the administratrix, the amount of which debts so paid, in the ascertainment of the dower of the administratrix, Mrs. Lang, was not deducted from the said value of the personal property, nor was any account whatever taken of the same;

5. Because the master failed to take any account of the waste of assets by the administratrix, which is distinctly set out in the answers of the heirs, and admitted by the administratrix, and that he refused to receive said answers as evidence of these acts of waste;

6. Because he refused to consider the accounts A., B. & C. attached as exhibits to the answers, as proof, though they are called for by the prayer of the bill, and are given in response thereto;

7. Because the account was not taken, nor the report made up, according to the directions of the Chancellor;

8. Because the master refused to consider the accounts A.,

B. & C. attached to the answers, when they were not surcharged or falsified, if at all, by more than one witness, who is unsupported by corroborating circumstances;

9. Because the master's report is contrary to the evidence before him upon the matters referred."

These exceptions were severally and collectively overruled by the master, and on an appeal to the Chancellor, were also overruled by him.

At the April term, 1852, the master was, by consent of parties, ordered to report the proof of Hubbard and Lang, witnesses examined before him.

But the view taken of the case renders it unnecessary to note particularly this proof.

On the final hearing, the Chancellor set aside the deed from Mrs. Lang to her children, declaring it to be fraudulent as to the complainant, who is her creditor, and proceeds, "that the defendants pay into court, for the use of the complainant, the sum $\$1982\frac{70}{100}$, together with interest on $\$1265\frac{50}{100}$, the principal amount of said sum from the 21st April, 1851, within thirty days of this date, and, in default thereof, that an execution may issue therefor against said defendants in the usual form."

From this decree a writ of error is prosecuted to this court, and the action of the court in overruling the defendants' exceptions to the master's report, and the final decree, are here assigned for error.

J. T. TAYLOR, for plaintiffs in error:

The complainant's evidence, if all true, proves nothing as against the children of Lang. The issue between them and the complainant, may be thus stated: The complainant charges, that the estate of Lang is able to pay all its debts, &c. and have, at the time of filing the bill, a large surplus for distribution; that Mrs. Lang is entitled to a distributive share; that she is indebted to them, and they seek to condemn it. The children, in their answers, deny the charge, and say that there is no fund in hand to which she is entitled; that she has received and spent already much more than she is entitled to as a distributee. Now, what is the proof under this issue? The complainant proves that Mrs. Lang received into her

hands, some fifteen years ago, as administratrix of said estate, a large amount of property; and here all the evidence stops. There is no evidence that she has ever accounted for one cent of this property. Nor does the complainant, who has taken her shoes, even propose to do it; nor does the evidence any where show that there is now one dollar on hand, in reach of the court, subject to a present division. There may have been a surplus on hand, in 1837, before any debts were paid or losses incurred; but can any one answer, from the evidence, where it is now? of what it consists, money, property or doubtful claims? The complainant seems to have forgotten his position in this case; he seems to claim a child's position, and endeavors to charge Mrs. Lang, when, in fact, he has assumed Mrs. Lang's place, and she must account for all these things before he can get her share.

The master should have reported the amount of assets now on hand, subject to division, and of what it consisted. The funds should then have been divided by a fair mode of division, and Mrs. Lang's portion set apart, and sold to pay complainant's debt. But, instead of doing this, they ascertain what ought to be the amount of funds, without any regard to whether it is a real or only an imaginary fund: whether notes or outstanding debts. No final decree could or ought to have been rendered on this report.

The decree in this case is erroneous in another essential. The defendants are ordered to pay this ascertained share of Mrs. Lang, or execution issues against them all; so, the result will be, that if this uncertain surplus the master reports, is not found when the sheriff goes, the children of Lang are not only to lose their interest in the estate, but are to pay the judgment against Mrs Lang out of their own funds.

But, considering this case as the parties seem to have considered it below, the master's report is full of errors. The complainant charges in his bill, that, except from what appears to be an account filed in the Orphan's Court in 1840, he is unable to ascertain the present condition of the estate, and prays that Mrs. Lang be required to state her account as administratrix. In response to this, she states and presents the account exactly as called for. Yet the master refuses to consider this as any evidence whatever, though he is, in sub-

stance, directed so to do by the order of reference, and although the plaintiff stands in Mrs. Lang's shoes, and is bound by her admissions, until some fraud or mistake is shown. 7 Ala. 582; 1 Freeman's Ch. 546; 1 Cow. 742; 4 Ala. 64.

The court erred in setting aside the deed from Mrs. Lang to the children until fraud was proven; the deed must stand good until the full and final settlement takes place, and the effects handed over to the children; for, until then, it cannot be known what devastavit may take place. 4 Ala. 64–6.

P. PHILLIPS, *contra:*

The answers of defendants are not evidence, except when they are strictly responsive to the bill; as when a bill was filed against the separate estate of a married woman, to subject it to the payment of a bond given to the complainant as executor, the answer admitted the execution of the bond, but alleged that, since its execution, she had discovered some errors in the account upon which it was given. The court says the effect of the admission cannot be destroyed by these subsequent statements; of these matters, set up in avoidance of a portion of her bond, her answer is not proof. Forrest and wife v. Robinson, 2 Ala. 216; Br. Bank at Huntsville v. Marshall, 4 ib. 60; Cummings v. McCullough, 5 ib. 324; Carpenter v. Dunn, 6 ib. 718; Powell v. Powell, 10 ib. 900; also, 306; 1 Wash. 224; Payne v. Coyle, 1 Munf. 395; Walker v. Miller, 11 Ala. 1067.

This question is especially referred to in the decision of this case in the Supreme Court, 14 Ala.; and it is said, this question would arise before the master, that is, how far the exhibits would be proof, and could then be determined upon. Supposing, however, an account furnished would be evidence for the administratrix, and still the exhibit offered would not do. It states, for instance, as her credit, "Amount expended on estate, $31,983 64." This is not an account, but the conclusion or result of one. Again: the account or exhibit is scarcely to be credited. Of the sixteen negroes mentioned, whose wages produce $17,282, we find, by the evidence of Lang, that four of them were used for family purposes, so that the account is not true in that particular. Again: by the account filed with the Orphan's Court by Mrs. Lang, 24th January,

1840, which she swears was a true account, we find, that for two years and nine months, she received for hire only $830 93. Allowing the same rate for the succeeding six years and nine months, ($2,039,) and it would only give $2,869 93. And this, also, invalidates the answer.

Again: It is seen that the family all live with Mrs. Lang, who supports and educates them at great expense, and since the filing of the account, it nowhere appears that she has made any charge for this since she filed her account. Again: The answer is invalidated by the allegation, that she made the deed to secure her children against a devastavit, when the proof offered by her own account shows that the estate, at that time, was in her debt. The deed was made 14th June, 1839. The return to the Orphan's Court, 24th January, 1840, shows a balance in her favor of $166 40, and yet the deed is said to have been made to protect the heirs against her devastavit.

But this proof of devastavit, by the rules of evidence, is thrown upon the defendant. It is the affirmative which she is bound to prove. The answer carefully conceals all facts or circumstances by which the truth of the allegation might be tested. The complainant has no means of proceeding. 2 Daniel's Ch. Pr. 981, 1496; 3 Phil. Ev. 490; Carpenter v. Devon, 6 Ala. 726.

If there has been no competent evidence before the register to sustain the plea of devastavit, then there would exist no obstacle to subject Mrs. Lang's share to the payment of the claimant's demand, except it be upon the ground that the deed executed 14th June, 1839, by Mrs. Catharine Lang, conveyed away to her children all her estate. This question, whether the deed could be supported upon the consideration of "love and affection," and whether it can be supported by proof of "valuable consideration," is waived by the Supreme Court. 14 Ala. 721. And they "rest the decree upon the paramount lien of the co-distributees." That is, the complainant had no lien except by the filing of his bill; and if, on reference to the master, it is shown by competent proof that Mrs. Lang was indebted to the estate, to an amount greater than her distributive share, the lien of the estate would be regarded as paramount.

The question, then, is: have the parties shown that there

was a devastavit, or indebtedness of any kind, by Mrs. Lang to her children? The defendants rely upon the exhibits to the answer. The register excluded them, as not responsive, and they fail to offer any other evidence to sustain them, and this is affirmed by the decree of the Chancellor. We maintain the correctness of this decision, and the case is, therefore, before the court upon matters set up in the answer, by way of avoidance, unsustained by evidence. It is said that a former chancellor decided the answers were responsive. This is not admitted; but if it be true, it does not conclude the question, for the Supreme Court, in the case already referred to, at page 722, expressly reserve the adjudication of the question, as one "which will arise before the register, and may come before the chancellor upon exceptions to the report, and when it has been definitely adjudicated in the primary court, can be here revised." So that this question is now presented in the very form indicated by the Supreme Court.

If the parties are driven, by the state of the account before the register, to take shelter under the deed, then that question is distinctly presented, and must be adjudicated. It needs no argument to show that the deed founded upon "love and affection" cannot be supported.

Can it be supported by the valuable consideration set up in the answer? To prove a different consideration, is contrary to the rules of law and equity. Murphy v. Trustees, 16 Ala. 94; Gresley's Eq. Ev. 287. Mrs. Lang makes the deed, and the other defendants claim under it. It has been already shown, that the deed was made 14th June, 1839; that she filed her account with the Orphan's Court, which is an exhibit to the bill, 24th January, 1841, eighteen months afterwards, showing the estate to be in her debt. Her answer to the bill is, that she admits she filed the said account, "and she now charges it was a true statement of the receipts and disbursements which had come to her hands at that time," and both the other answers admit the same thing. Now, if this be true, as already stated, how extraordinary is the statement that the "real consideration for deed made eighteen months prior, was to secure the estate against her devastavit." Respondent charges, "that in the management of said estate, acting, as she supposed at the time, for the benefit of said heirs,

but, as she is advised and believes, without any authority or warrant of law, as administratrix, she has so acted that she is and was liable for a devastavit of the estate more than the amount of her distributive share." The statement of the answers in reference to the account filed with the Orphan's Court, given above, apply, also, to the objection made as to the admissibility of that exhibit before the register.

LIGON, J.—That a judgment creditor has the right to pursue the equitable estate of his debtor, in a court of chancery, and have it set apart to the payment of his debt, is a proposition, which, I apprehend, will not now be controverted; and that the interest of one of several co-distributees in an intestate's estate, may be thus charged, was settled by this court, in this case, when it was here at a former term. 14 Ala. 719.

But in order to do this, it is indispensably necessary that the Chancellor should proceed to make a final settlement of the administration, and separate the portion of the judgment debtor from the remainder of the estate, before a final decree can be pronounced, condemning such portion to the payment of the demand. To this end, the master should take just such an account of the affairs of the administration, as is required to be taken by the Probate Court, on the final settlement of intestates' estates; and, when this is done, the Chancellor should direct the estate to be distributed among the parties in interest, in a manner as nearly conformable to that pointed out by the statute, for the government of the Probate Courts, as is practicable, and then direct the sale of so much of the portion sought to be charged by the creditor, as shall be sufficient to satisfy his demand.

Such appears to have been the opinion of the Chancellor at the time the reference was made to the master, in the case under consideration. It was evidently intended by him, that Mrs. Lang, (who was at once the widow and administratrix of Willis Lang, deceased, and the judgment debtor of the complainant,) should make a full settlement of her administration. Accompanying the order of reference, is the opinion of the Chancellor (Crenshaw) upon the rights of the parties in several important particulars, concerning the account

to be taken before the master; and these, so far as they go, should have been regarded by that officer as directions to him, in the discharge of his duties under the order. It having been admitted in the answer of Mrs. Lang that she had used and misapplied the assets of the estate, the Chancellor directed that an account of the sums so wasted should be taken by the master, and charged upon her portion of the estate, when the settlement was made. He declared that the lien of the heirs at law of Willis Lang, deceased, on the distributive portion of the widow, arising out of her waste of the assets of the estate while she was administratrix, was prior and paramount to that of the complainant, which never attached until his bill was filed, and that he could stand in no better position in relation to the distributive portion of the widow, than that which she occupied herself. He further declared that the accounts exhibited with the answer of Mrs. Lang, were responsive to the bill, and being called for by it, they should be received as proof, unless they were surcharged and falsified by other proof before the master. We repeat, that these rulings of the court, accompanying the order of reference, cannot be regarded in any other light than express directions to the master, to guide him in taking the account. He was not at liberty to disregard, or act in opposition to them, in stating the account under the order of reference, especially after they had been passed upon by this court, and their correctness sanctioned. Brown v. Lang et al., 14 Ala. R. 719.

We will now proceed to consider the exceptions taken before the master, and certified by him, with his report, as having been taken by the defendants.

The first three exceptions do not appear to be founded on anything contained in the record, in the report of the master, or any of the exhibits accompanying that report, and were rightly disallowed.

The fourth exception is well taken. Under the order of the Chancellor, with the directions preceding it, the master should have made out an account current between the administratrix and the estate, and in order to do so correctly, it was necessary for him to have ascertained the amount of the debts of Willis Lang, which had been paid by the administratrix,

up to the time the account was taken before him, that this sum might be carried to her credit. The failure to do this, was an error, for which the whole report should have been set aside.

The fifth exception is equally well founded, and it was palpable error to disallow it.

The sixth, seventh and eighth exceptions arise out of the master's disregard of the directions of the Chancellor, in reference to the matters involved in them respectively. An examination of the report shows, that it is justly obnoxious to each, and every one of them, and that it was error to disallow them.

Had no exceptions whatsoever been taken to the report of the master, the Chancellor should not have permitted it to stand, for the reasons, first, that the master disregarded the instructions and directions of the Chancellor; and, secondly, because the report does not furnish the facts necessary to enable the court to proceed to a final decree on the merits of the case. A report which is obnoxious to either of these objections, does not require exceptions to set it aside.

It may be remarked with respect to the first of these objections, in the present case, that the report, on its face, shows an utter disregard of the instructions of the Chancellor. These directed the master to ascertain and report the amount of waste committed by Mrs. Lang, arising from a misapplication of the assets of the estate in her hands to be administered. Nothing of this kind appears to be done, although the master's attention on the reference, was distinctly called to it by the defendant, as appears by the exceptions certified with his report. He refuses also to consider the exhibits attached to the answers of the defendants, which show the property, real and personal, belonging to the estate of Willis Lang, deceased, which came to the hands of the administratrix, with its kind and value, as well as an account of the rents and profits of the estate to the time the answers were filed. The Chancellor had directed him to regard these as evidence, unless they were surcharged and falsified, yet he takes it upon himself to say, that he did not regard these portions of the answers as responsive to the bill. It is not allowable for the master to set up his own opinion, on a matter connected with

the reference made to him, in opposition to that of the Chancellor. His duty is to obey, and if it is desired that the Chancellor should review his directions, the party supposing himself to be aggrieved by this obedience of the master, may take exceptions, and by this means bring the point again to the attention of the Chancellor. If, on the argument of these exceptions, it should be made to appear, that the justice of the case cannot be got at, without an alteration of the decree, in conformity with which the report is made, he will direct the report to stand over, and order that portion of the former decree containing the erroneous directions, to be reheard. It is not competent for the court, upon exceptions, to make an order which is not consistent with the original decree; from the time of the pronunciation of that decree, all the subsequent proceedings should be consistent with it. Daniel's Chan. Prac. & Plead. 1499.

In this case, the master has undertaken to do, what is not allowed to the Chancellor, and that, too, after the action of the Chancery Court had been reviewed and affirmed by this court. He has reported in direct opposition to the original decree, and an order confirming his report is so great a departure from that decree, and so clear an exercise of unauthorized power on the part of the Chancellor, that it may be reviewed in this court, without exceptions taken in the court below.

As to the deficiency of the report, in respect to the facts necessary to enable the Chancellor to proceed to a final decree on the merits of the case, it may be said, that with the exception of the sum due the complainant on his judgment, it appears to be total. Neither the report, nor the exhibits attached to it, show either the condition of the estate, the property, real and personal, belonging to it, subject to distribution, or the shares or portions of the distributees. No account current is made out in that form which would warrant the Chancellor in proceeding to a final settlement of its affairs, and a decree of distribution. A report so directly repugnant to the order of reference under which it purports to have been made, and so deficient in those facts upon which the final action of the court could alone be based, need not be excepted to, in order to set it aside. In such cases, it is

the duty of the Chancellor, either to direct the master to review his report, in order to conform it to the decree under which it is made, or to disregard it *in toto*, and order him to report under the original decree. 2 Daniel Chan. Prac. & Plead. 1501; Turner v. Turner, 1 Dick. 313, 1 Swanst. 156.

For another reason, the decree in this case must be reversed. By its terms, the Chancellor directs the "defendants" generally, thereby including the children of Willis Lang, deceased, to pay into court the sum reported by the master to be due on the complainant's judgment against Mrs. Lang, within thirty days, and in default of such payment, he directs an execution therefor against said "defendants," in the usual form. The bill seeks no moneyed decree against the heirs at law of Willis Lang, deceased, nor does it, in any of its allegations, lay a predicate which will justify such a decree; neither does the complainant pretend to have any demand against them. It is true, he alleges that Mrs. Lang has made to them a voluntary deed for her portion of the estate, which he insists is fraudulent as to him; but he seeks to set this deed aside altogether, and does not seek to charge the property conveyed by it in the hands of the grantees, or to have them declared trustees of her interest, for his benefit. His whole object seems to be, to disencumber Mrs. Lang's portion, and have it set apart for the satisfaction of his judgment against her. The children of Willis Lang, deceased, are made parties, for the purpose of effecting a final settlement of the estate, in which they had a joint interest with their mother; and because they are the grantees in a deed, made by Mrs. Lang, which is alleged to be fraudulent as to the complainant. For these purposes, they were not only proper, but necessary parties to the bill, and the only relief sought against them, is, the prayer that the deed made to them by their mother, be set aside for fraud. A decree, which, like the present, grants more extensive relief than is prayed for by the bill, or justified by its allegations, and the proof taken under them, is erroneous. Again, the decree, in its present form, is inoperative. It is shown by the proof, that neither Mrs. Lang nor her children have any property, apart from their interest in the estate of Willis Lang, deceased; this is not subject to levy and sale for the debts of any, or all of them, under execution

on a moneyed decree, so long as the estate remains unsettled in the hands of the administratrix; such an execution is as powerless to charge the property, as the one which issued on the judgment at law. To render the decree operative, it was indispensable to separate Mrs. Lang's portion from the portions of her children; and to do this, a final settlement of the administration, and a distribution of the personalty were both necessary; neither of which has been effected here.

The deed made by Mrs. Lang to her children, purporting to convey all her interest in her husband's estate, is, on its face, made upon consideration of natural love and affection, and none other is established by proof. It is voluntary, and being made at a time when she was indebted to the complainant, it is, therefore, void as to him, and was rightly set aside. This, however, cannot affect the right of the children to have so much of her portion of the estate appropriated to their own use, as will be sufficient to make good any waste, or misapplication of assets, which has occurred during her administration, and this in preference to the claim of the complainant. She could not be permitted to receive any part of the estate in her own right, while she was a debtor to the trust fund, for moneys appropriated from that fund to her own use; neither can the complainant, who occupies her position to the extent of his demand against her, be allowed to do so.

It is proper here to remark, that in the second head-note prefixed to the case of Brown v. Lang, 14 Ala. 719, in which it is said, that this court "held, that in the absence of fraud, the co-distributees, *had, under the deed*, a prior lien on the share of the administratrix, as distributee, to the lien of the creditor," the reporter was betrayed into a misapprehension of what was really decided by the court. No question could properly have arisen in that case, in this court, on the validity or invalidity of the deed, or its legal effect, for the obvious reason, that no opinion had been expressed on this branch of the case in the court below, but it was distinctly reserved by the Chancellor until the coming in of the master's report, and consequently was not here for revision. In the opinion of the court, it is said, "We may then place out of view the deed, without stopping to inquire whether it can be supported by proof of valuable consideration, and rest the decree of

the Chancellor upon the paramount lien of the co-distributees of the intestate's estate, upon the share of Mrs. Lang." This explanation I esteem due to the court, to prevent the inference which might otherwise be drawn, of a conflict between our decision then and now in reference to the deed from Mrs. Lang to her children. So far from a conflict, the harmony is complete, since both decisions proceeed upon precisely the same principles in setting up the prior equity of the distributees.

The master's report must be set aside, and the decree reversed at the cost of defendant in error. The proceedings, up to the order of reference, are regular and without error; the cause must therefore be remanded, with directions that it be taken up at that point, and proceeded in to a final decree, on the principles laid down in this opinion, and the opinion of the Chancellor accompanying the order of reference.

HOGAN'S Ex'r. *vs.* CALVERT, Adm'r.

1. No exceptions can be taken to a claim properly filed against an insolvent estate, going to the affidavit or to the claim itself, unless they are filed within the time prescribed by the act of 1843; but objections extending to the time of filing may be made at any time.
2. A claim against an insolvent estate is not required to be in any particular form; it is sufficient if it shows the liability of the estate to the party asserting it.
3. A party having merely an equitable title to a demand against an insolvent estate may file it as a claim against the estate.
4. Where one partner covenants, in consideration of a sum of money paid him by his co-partner, to pay the debts of the firm without unnecessary delay, and without recourse on his co-partner, a failure on his part to perform the act which he had covenanted to do gives a right of action to his co-partner; and the latter may in such case file his claim against the estate of the deceased partner, before he has paid any part of the partnership debts.
5. Where a bond is conditioned for the payment of money at a certain day, the whole debt accrues from the day mentioned in the condition, and does not wait the damnification, although it may appear that the bond was given by way of indemnity merely; and the same rule applies to covenants.

Error to the Court of Probate of Mobile.

On the 21st February, 1846, the estate of Charles Ham-

mond was declared insolvent, and on the 20th August, 1846, a claim against said estate was filed by Benjamin R. Hogan, the testator of the plaintiff in error, for $4,186\frac{15}{100}$, predicated, according to the record, on five bills of exchange, drawn by Hammond on Saxon & Smith, in favor of Hogan & Hammond, and by them endorsed to Hogan in settlement of the business of the firm, and remaining unpaid, and another item which is thus stated: "Also the sum of $2,008, being the amount found by arbitration on the 14th August, 1846, to be due by the late firm of Hogan & Hammond to Whitaker & Bartol, and which by agreement of dissolution you (Hammond) assumed." With the account thus stated against the estate, was also filed a deed of covenant, purporting to have been executed by said Hogan and Hammond on the 8th August, 1839, reciting the existence of the co-partnership of Hogan & Hammond, its dissolution on 1st July, 1839, with a covenant on the part of said Hammond, for the consideration of $5,000 paid him by Hogan, to pay and settle, without unnecessary delay, and without recourse on the said Hogan, all the liabilities of said co-partnership, and said Hogan relinquished all his interest in the co-partnership effects to said Hammond.

On the 9th September, 1851, the administrator filed his objections to said claims: 1. Because on its face there was no liability; 2. Because it was not verified, as by law required; 3. Because it was not filed in time. On the hearing of the claim, which was on the 12th September, 1851, the claimant presented his claim, introduced the covenant, and claimed judgment, because no objections had been filed to his claim within nine months after the decree of insolvency. But the objections filed by the administrator on September 9, 1851, being then renewed, the claimant's motion was refused, and upon the hearing the claim was rejected.

The overruling of the motion and rejecting the claim are now assigned for error.

P. HAMILTON, for plaintiff in error:

The court erred in not granting the motion for allowance of the claim of Hogan, upon the statement and affidavit filed. No objections were made to the claim within the nine months

allowed by law, on the part of the administrator. The law is imperative. See stat. 1843, Clay's Dig. 194, § 10.

By their contract upon dissolution of the firm of Hogan & Hammond, which was filed with the claim of Hogan against Hammond's estate, Hammond bound himself to pay the debts of the firm. The claim of S. Jones was against Hogan & Hammond. Hogan was sued upon it, and judgment rendered; the amount was ascertained only seven days before the six months expired after decree of insolvency. The claim was filed within six months after decree, though Hogan did not actually pay the money till afterwards. Hogan became thereby in effect a security for Hammond. 14 Ala. 92, pp. 102, 103, decides the principle that should govern this.

The facts stated in the bill of exceptions show that Hogan had a claim against Hammond when his demand was filed. In equity he could call on Hammond's estate to pay the debt. Theob. P. & S., 1 Law Lib. 135, ch. ix.

The claim having been filed in time to save the limitation of six months, this court has frequently decided the affidavit may be made at the hearing. The affidavit and proof at the hearing, were full to the merits of the claim, and, without objections filed within the statutory period of nine months, satisfactorily proved the justice and equity of the demand.

No good reason exists for requiring a new claim to be filed. The claim as filed answered every purpose of giving notice of its nature and extent, and the proof at the hearing did not in the slightest manner vary its character.

The object of our statute as to insolvent estates, as to distribution among creditors, is the same as the English bankrupt law. Under the latter, this claim would be allowed. Theob. P. & S. 239; 1 Law Lib. 142; and see Emanuel v. Bird, Adm'r., last term. The estate has received the benefit of the debt paid by Hogan.

P. Phillips, *contra:*

It appears that, pending the suit between Jones and Hogan, the matters were submitted to arbitrators, who made their award on the 14th August, 1846, and this was subsequently made the judgment of the court. But the judgment of the court, and the payment, were subsequent to the time fixed

for presenting the claim, and subsequent to the time the claim was filed. There was no demand under any circumstances existing against the estate in favor of Hogan, until he paid the money.

By the terms of the dissolution, for a consideration then paid, Hammond undertook to pay the debts of the concern. As Hogan was originally bound as a partner, his right to claim this entire demand, arises solely upon the agreement set up, and the payment made by him.

It would seem clear, therefore, that he had no right against the estate by virtue of the claim filed on the 20th August, 1850. There is no proof that any such debt ever existed against Hammond. For aught that appears, the acceptances sued on may have been given by Hogan for his own purposes. The simple recitals that Hogan was sued as surviving partner, are not sufficient. Marr v. Southwick, 2 P. 351.

When the claim is objected to, the party is put to the proof of his claim, and his first step was to establish the debt as one due by the partnership. Brasher & Gooche v. Lyle, 13 Ala. 524.

Nor does the affidavit show or in any manner establish an indebtedness against said estate. Hammond having died before the partnership was settled, Hogan, as survivor, was bound to see to the disposition of the partnership effects. Can Hogan present a claim against Hammond's estate until he had a full settlement of the partnership affairs? 1 Ala. 524.

GOLDTHWAITE, J.—In the case of Bartol v. Calvert, Adm'r., at the present term, we decided that, under the statute of 1843, (Clay's Digest, 194, §§ 10, 11,) no exceptions could be taken against a claim properly filed against an insolvent estate, going to the affidavit, or to the claim itself, unless such exceptions were filed within the time required by the provisions of that act; and that objections extending to the time of filing might be made at any time. This decision renders it unnecessary to consider the question presented as to the verification of the claim, the record showing affirmatively that it was not made until some years after the decree of insolvency, and also that it was objected to by the claimant. Although the action of that court may have been erroneous,

in allowing an exception to be taken to the affidavit; yet, if the claim upon its face shows no liability, or showing a liability was not filed in time, it was rightly rejected, and the judgment of the court being correct, the plaintiff in error cannot complain of that which was not prejudicial to him.

The estate was reported insolvent on the 21st February, 1846, and the claim was filed on the 20th August of the same year, which was in time. In relation to the exception, that no liability appeared upon the face of the claim, we may remark, that the principal object of the Legislature, in the enactment of the law of 1843, regulating proceedings on insolvent estates, was, to provide a cheap and expeditious mode for the settlement of estates in that condition. The creditor was required to file his claim within six months after the decree of insolvency, and the administrator, or any creditor in his name, might contest any claim within three months after the expiration of the latest day allowed for filing. The estate was not to be embarrassed, or the proceedings delayed, by proof of the claims, except in such cases as the real parties in interest might denote, by directing their exceptions to them; and failing thus to proceed was held as an implied admission of their correctness, and judgment was rendered accordingly. As, however, the action of the court, in rendering its judgment, could only be prejudicial on the claim as it was asserted against the estate, although no particular form is required, it has been held, that enough must appear to show the liability of the estate to the party asserting the claim. Cook v. Davis, 12 Ala.

There is no decision expressly to the point, that a party having merely an equitable demand will be allowed to proceed under the act referred to; but we see great inconvenience in compelling a resort in such cases to a court of chancery, and think the right clearly deducible from the objects of the statute.

There is but little difficulty in the application of these principles to the facts disclosed by the record before us. The first item of the claim is made up of sundry bills of exchange, on which the liability of the intestate Hammond appears, and the right of the testator Hogan accrues from the endorsement, as stated in the account. In relation to the item of

$2,008, we consider the statement of the account in effect to be, that this sum was due from the firm of Hogan & Hammond to Whitaker & Bartol, which Hammond, by his agreement filed with the account, had assumed; and the question in this aspect is simply, whether the item referred to, taken in connection with the agreement filed, shows a demand due to Hogan for which the estate is responsible. The argument that Hogan had no claim upon the estate, until he had actually paid the amount due, cannot be sustained. The covenant of Hammond was not one of indemnity; it was affirmative. He was to pay the debts of the co-partnership, without unnecessary delay, and a failure on his part to perform the act which he had covenanted to do, would have given a right of action to Hogan. *Ex parte* Negus, 7 Wend. 499; Port v. Jackson, 17 Johns. 239; ib. 479; Chace v. Hinman, 8 Wend. 452; Ramsey v. Gervais, 2 Bay, 145; Bauer v. Roth, 4 Rawle 99; 1 Saunders 177, note. The cases cited are conclusive as to the right of action; and as to the damages the rule is, that where a bond is conditioned for the payment of money at a certain day, though it appear that it was given by way of indemnity merely, the whole debt accrues from the day mentioned in the condition, and does not wait the damnification. Toussaint v. Martinnant, 2 Term, R. 100; Martin v. Count, ib. 640; Hodgson v. Bell, 9 Term, R. 97; Holmes v. Rhodes, 1 B. & P. 638; and the same rule was applied to covenants. Port. v. Jackson, 17 Johns. 239; *Ex parte* Negus, 7 Wend. 499. The circumstance that it was a co-partnership debt does not in any manner affect the rule. If Hogan was by suit upon the covenant to recover the amount of the co-partnership debts from Hammond, who was afterwards compelled to pay them by the creditors, he could resort to Hogan for his proportion, and the covenant could not, after he had sued and obtained satisfaction upon it. be invoked for his protection.

It follows from these views, that the item referred to correctly showed the liability of the estate, and that the court below, under the circumstances, erred in its rejection.

The judgment is reversed, and the cause remanded.

ANDRESS *vs.* BROUGHTON.

1. A bill of exceptions will be construed most strongly against the party excepting.
2. When the bill of exceptions sets out several distinct charges and refusals to charge on request, and concludes with the words, "to which defendant excepted," the exception will be construed to apply only to the charge and refusal contained in the paragraph immediately preceding it.
3. When an execution comes to the hands of a sheriff after the expiration of his term of office, he has no more authority to levy it than any other private individual; and if he levies upon and sells the defendant's property by virtue of it, he is liable in trover or trespass.
4. In such case, the defendant will not be held to have waived the tort, by being present at the sale and asking a postponement of it, and by requesting the sheriff not to pay over the money arising therefrom to the plaintiff in execution, when it is not shown that he was aware of the want of authority on the part of the sheriff.

ERROR to the Circuit Court of Monroe.

Tried before the Hon. JOHN BRAGG.

TROVER by Broughton against Andress. The bill of exceptions first sets out the substance of the evidence, for which see the opinion, and then the charges of the court, in the following language:

"And the court charged the jury, that this request was not such evidence of the waiver of the tort, as to prevent the plaintiff from bringing this action of trover; and the defendant asked the court to charge the jury, that if Broughton agreed to take the money arising from the sale, he cannot maintain this action. But the court refused to give the charge asked for; but charged the jury, that if the plaintiff agreed to take the money, and it was tendered or paid to him, then he could not maintain this action.

"And the defendant asked the court to charge the jury, that if the plaintiff ever requested the defendant not to pay over the money arising from the sale, it is a circumstance from which the jury might infer that plaintiff admitted that the slave was properly sold, and further, that he thereby waived the tort and looked to the money: which charge as asked the court refused to give, but charged the jury, that the proof as

made was not such evidence of a waiver of the tort as to preclude the plaintiff from maintaining this action.

"And the defendant further asked the court to charge the jury, that if plaintiff requested defendant not to pay over the money received on sale of July, the jury might infer that the plaintiff looked to the money alone to be his, dependent upon the right of the Bank; which charge the court refused, but charged the jury, that if Andress received the execution after his term of office expired, he had no more right to act under it than any other private individual; and if he had acted under it, and sold the property of plaintiff, he was liable in this action, and plaintiff had not lost his right to resort to it by what was shown by the proof to have passed between them.

"To which defendant excepted; whereupon," &c.

The errors assigned are:

1. The court erred in giving the charges shown in the bill of exceptions;

2. In refusing to give the charges as shown by the bill of exceptions;

3. In giving the qualifications to the charges asked;

4. In rendering judgment for the defendant in error.

WATTS, JUDGE & JACKSON, for plaintiff in error:

1. The bill of exceptions shows that the plaintiff in error excepted to the charges given, and also the refusal to give the charges asked. The language used at the end of the bill of exceptions will apply to all the charges given, and to those refused. See Fletcher v. Weisman, 1 Ala., 602. It may be asked, why were the charges asked and those given inserted in the bill of exceptions, if they were not excepted to?

2. The judge undertook to decide what was proved and what it ought to weigh, in the first charge given, and thereby usurped the province of the jury.

3. The charge asked under the third head in the bill of exceptions was a proper one, and ought to have been given; and the court erred in refusing to give it as asked. The qualification given under the same head was certainly assuming to judge of what the whole testimony proved. This should have been left to the jury. And the affirmative charge given

by the court under the fourth point in the bill of exceptions is objectionable for the same reason.

4. The facts proven, viz: that Andress requested twice a postponement of the sale; that he was present at the sale, making no objections; that he afterwards requested the sheriff to hold the money until he could see whether he had paid the debt; that the sheriff had so held the money, are facts which show that no trespass had been committed; or, if committed at all, had been waived by the defendant in error; *volenti non fit injuria.* Broughton consented to the sale, and his request to Andress to retain the money, which Andress did in obedience to his request, at most, only authorized *assumpsit* to be brought for the price brought at such sale.

It certainly was not necessary, as seems to have been supposed by the circuit judge, for Andress to tender the money to Broughton. It was rather Broughton's duty to demand the money of the sheriff.

WILLIAMS & COCKE, *contra:*

1. The bill of exceptions is construed most strongly against the party excepting. 6 Ala., 801. It is not enough, therefore, to ask charges and make objections; the opinion of the court must be excepted to. Bank v. McDade, 4 Por., 252, vide page 265; Milton v. Rowland, 11 Ala., 740.

2. What is a waiver, where the facts are undisputed, is a question of law. Hill v. Hobert, 4 Shepley, 168; 16 Maine Rep., 168

3. A waiver is an estoppel, and some act must be done by the party resulting in injury or loss to the adverse party. Assignees of Pittee v. Sparrow, 7 Barn. & Cres., 310, 14 E. C. L. R., 50; Brewer v. Brewer & Logan, 19 Ala., 482.

4. Andress, the plaintiff in error, was a trespasser *ab initio;* and the record does not show that defendant in error had any knowledge he was no sheriff, and Andress is not injured by any acts of plaintiff below.

PHELAN, J.—This was an action of trover, brought by Broughton against Andress to recover the value of a slave named July.

There was evidence "tending to prove" that Andress, who

was sheriff of Monroe from 1843 to 1846, in August of the latter year, and a few days after his term of office had expired, received an execution in favor of the Bank of the State of Alabama against the plaintiff, and levied it on the slave in question, and finally sold him under it in December, 1846; that while Andress had this execution in hand, he was requested by plaintiff to postpone the sale twice, that he might obtain evidence from Tuskaloosa to show that the debt was paid; that plaintiff was present at the sale; that after the sale, and in December, 1846, plaintiff requested Andress not to pay over the money received from the sale of said slave to the Bank; and that Andress had never paid over the money to the Bank or plaintiff, but still holds it.

The court was requested by the counsel for the defendant to give several charges, which were refused, and other charges, different from those requested, were given by the court; but there was no exception taken to them.

The bill of exceptions then contains the following as its closing portion: "And the defendant further asked the court to charge the jury, that if plaintiff requested defendant not to pay over the money received on sale of July, the jury might infer that the plaintiff looked to the money alone to be his, dependent upon the right of the Bank; which charge the court refused, but charged the jury, that if Andress received the execution after his term of office expired, he had no more right to act under it than any other private individual; and if he had acted under it, and sold the property of plaintiff, he was liable in this action, and the plaintiff had not lost his right to resort to it by what was shown by the proof to have passed between them. To which defendant excepted; whereupon, this bill of exceptions is sealed," &c.

We can only notice the charge which was refused, and that which was given, contained in the paragraph immediately preceding the exception. The words, "to which defendant excepted," by the ordinary rules of construction, can only apply properly to the matter of the independent paragraph in immediate connection with them;—their immediate antecedent. To say that the pronoun "which" shall have four or five separate charges and refusals to charge, spread over more than a page, as its antecedent, would not be correct according to

any rule of criticism. But the rule of construction applied to bills of exceptions as against the party excepting, is a strict rule; it is, that they shall be construed most strongly against the party excepting. 4 Por., 252; 11 Ala.; 15 Ala., 18; 6 Ala., 801. Under this rule, we cannot hold that any exception is taken, except to the refusal to charge and the charge given contained in the paragraph immediately preceding the exception.

The rule of law stated by the court, that if Andress received the Bank execution after the expiration of his term of office, it conferred no authority whatever on him to levy upon and sell the property of plaintiff, is correct. After the expiration of his term of office, he became, as to new writs, a mere private individual, and final process coming to his hands, directed to the sheriff, conferred no authority on him for its execution. He had no more right to sell the plaintiff's slave after that time, by virtue of an execution then first delivered to him, than if no such process had existed. Cuthbert v. Tardy, decided at this term. So far as the rights of the plaintiff were concerned, he was a mere trespasser. Peck v. Holcombe, 3 Por., 329.

In an action between third persons, the acts of an officer *de facto* may often have validity, because he acts under color of authority. 7 Ala., 535. But in an action against the officer himself, the lawfulness of his action must depend upon his actual right to exercise the power which is claimed. He must be an officer *de jure*, and armed with a lawful precept. 7 Ala., 578. If he sells under process before or after the time prescribed by law, (4 John., 450;) if he levies process out of his county, although he may sell it within, (3 Dana, 489;) he is liable to trespass at the suit of the injured party. When sued in trover or trespass, an officer, to justify, must show a process valid in law, and that he executed it pursuant to law. It is true, if he levies an execution, not valid, or not at a proper time, upon the goods of the defendant, he may show in mitigation of damages that the money has been paid in satisfaction of judgment against the plaintiff, but in mitigation only. 6 Mass., 20; 4 Harrington, 303.

It nowhere appears from the bill of exceptions, that the plaintiff was aware of this tort, at the time he requested the defendant to postpone the sale and not to pay over the money.

Even then, if these things could conduce to show that he had waived the tort, had it been also shown that he knew defendant had no authority to sell, it will not do to hold, that he waived a tort of which he was in fact ignorant at the time. It must always appear that a man has knowledge of a thing, before he can be construed to act in reference to it. So here, as it is nowhere shown that plaintiff knew that the process under which defendant sold his slave gave him no lawful authority to make that sale, his being present at the sale, his asking a postponement of it, or that defendant would delay paying over the money to the Bank, cannot show, nor conduce to show, a waiver of the tort on the part of the plaintiff.

We find no error in the charge of the court, and the judgment is affirmed.

DENSON & WIFE *vs.* AUTREY'S Ex'r.

1. A testator, under our statute, can only defeat his heirs at law or distributees by making a distribution of his property; and if any portion of it remain undisposed of by will, the heirs at law or next of kin are entitled to it, notwithstanding it may appear that the testator did not intend that they should succeed to it.

Error to the Court of Probate of Monroe.

E. W. Roberts, for plaintiff in error:

When there is a complete will, the heirs of the testator take the residuum of the estate, if any be left not disposed of by the will, as if it had been actually given to them; therefore, a child that has been advanced by his father in his life, or provided for in the will, cannot be called upon to bring his share into hotchpot. 2 Will. on Executors, 2 American from second and last London ed. 1070; Walton v. Walton, 14 Vesey, 324.; 2 P. Williams, 440, 446; Prec. in Chancery, 169. The law of hotchpot only applies to cases of actual intestacies, (Clay's Dig. 197, § 25), the reason of the law being to make all the children of an intestate equal. This,

in partial intestacies, entirely fails. The reason of the law failing, the law itself ought to fail. 1 Black. Com. 61.

The third clause of this will, in effect, bequeaths the two negroes, Edy and Mariah, and their increase, to Mrs. Denson; they are, therefore, a bequest, and not an advancement. Plaintiffs are entitled to their distributive share of the residuum of testator's estate not disposed of by his will, because, the statute of descents declares, that when any person shall die seized of an estate, &c., not devised, the same shall descend to his or her children, in equal parts. Clay's Dig. 168, 2. And this statute applies equally to personal property. Clay's Dig. 191, § 1; 10 Ala. 662. These statutes are not confined to cases of actual intestacies only, but extend to all cases of goods, chattels and personal estate not bequeathed. Harrison v. Harrison, 9 Ala. 476. Effect cannot be given to the third clause of this will, to exclude plaintiffs from their distributive share of the residuum of testator's estate not disposed of by the will, because it is negative in its terms, and does not amount to a gift of the property in question to any person. The only mode of excluding the title of whomsoever the law, in the absence of disposition, constitutes the successor to the property, is to give it to some one else. 1 Jarman on Wills, 294. It is true that the intention of a testator must prevail, but it must be confined to the subject matter of the will, and cannot be extended so as to embrace other property than the subject of the will.

A will, to be valid, must be dispositive or revocative, and not negative; for negative words do not amount to a gift, and cannot exclude the heir or next of kin. 2 Jarman on Wills, 21; Goodtitle v. Bailey, B. P. C, Toml. ed. 454; but see 573, 575, S. C. cited, 2 Mer. 348; Johnson v. Johnson, 4 Beav. 318.

The law having provided a definite successor to the property, will not suffer rights thus ascertained to be superseded by others not pointed out by the testator with equal distinctnesss. 1 Jarman on Wills, 316–17, and cases cited.

Effect cannot be given to the third clause in this will, to exclude plaintiffs from their distributive share of the residuum of the testator's estate, because the statute declares that it shall descend in equal parts, which would not be the case if

plaintiffs were excluded altogether; nor would it be divided as the estate of an intestate.

R. C. TORREY, *contra:*

1. The statute (Clay's Dig. 597, § 7,) was intended to prevent the executor from claiming the residue of the estate, as he otherwise might by the rule of the common law. 2 Lomax on Exrs. 183–4; Will. on Exrs. 898–9, 2d ed. 1049–50.

2. The intention of the testator to exclude Mrs. Denson is clear, and he had that right, notwithstanding the language of the statute. Blakeney v. Blakeney, 6 Por. 119; 3 U. S. Dig. 484, §§ 63, 64, 65. The third clause of the will, not being contrary to law, must be carried out. Leavens & Malone v. Butler and wife, 8 Por. 380. The letter of the statute must yield to the testator's intentions. Same case, 392–3; Heirs of Capel v. McMillan, 8 Por. 197; 17 Ala. 396, 84; 18 ib. 819.

3. The court ruled correctly as to the necessity of Mrs. Denson bringing into hotchpot the advancement she received from her father in his lifetime, because the equity of the statute requires it, though the language of the statute (Clay's Dig. 197,) refers to the children of a person dying intestate. 2 Lomax on Exrs. 184.

DARGAN, C. J.—William Autrey, by his will, devised to his wife certain real and personal property during her life, and after her death, to his son John. He also gave his son Alexander certain other property, and charged his two sons with the payment of three legacies, of one hundred and fifty dollars, each, in favor of his grand-children, to-wit: Joel W. Lee, William C. Ross and Sarah E. Ross. The third clause of his will is in the following language: "My will is, that my daughter, Uravia Denson, shall have no more than the two negroes, and their increase, that I have given her, viz: Edy and Mariah."

The will specifies all the property given by it, but makes no disposition of the residue. The executor and executrix filed an inventory of the property of the testator, from which it appears that the testator had considerable property at the time of his death, not disposed of by will; and the debts

being paid, Mrs. Denson and her husband filed their petition in the Probate Court, praying a distribution of the property not disposed of by the will. It was objected, that she was excluded, by the terms of the will, from all interest in the property of the testator, even though not disposed of by the will, and this objection was sustained by the court, and the petition was dismissed. To reverse the action of the court in dismissing the petition, the cause is brought before us by writ of error.

The rule of law was, that if there remained a residue, after the payment of all debts and legacies, it belonged to the executor, and he could not be compelled to distribute it, unless, from the whole will, there was a strong presumption, or a necessary implication, that the testator intended to confer on his executor the office only, and did not intend that he should take any beneficial interest in the residue. 2 Will. on Exrs. 898-9. But, by our statute, it is declared, that all such estate, real and personal, as is not devised or bequeathed by the last will and testament of any person, shall be distributed in the same manner as the estate of an intestate, and the executor or executors shall administer the same accordingly. Clay's Dig. 597. Under this act, it is very clear that Mrs. Denson would be entitled to her distributive share of the property not disposed of by the will, unless she is to be excluded by the will itself, and I am very clearly of the opinion, that she is not excluded.

When no disposition is made of property by will, the law designates who shall take or succeed to it, and I do not see how a testator can control the law, otherwise than by disposing of the property. Suppose a father should, by will, merely provide for the payment of his debts, and then declare that neither his heirs at law nor his distributees should have any of his estate, whether real or personal, who would take the surplus, after the payment of his debts? To hold that his heirs and next of kin should not take, would not only defeat the statute, but would leave the surplus without an owner.

But it is contended, that the will of the testator clearly shows that it was the intention of the testator that Mrs. Denson should only take, of his whole estate, the two slaves named in the third clause, and that being the intention, the residue

not disposed of by the will should go to the other distributees, excluding her But the answer to this is, that the other distributees cannot claim the residue under the will. The will gives them no title to it, and they must resort to the statute we have referred to, as the source of their title; and looking to that act, they can claim only a distributive share, and all who are distributees can claim with them. The intention of the testator can only affect property upon which the will operates; and even if it should appear that the ancestor did not intend that his heir should take either by will or inheritance, yet if he makes no devise of his land, the heir will take by inheritance. Goodtitle on demise of Baily v. Pugh, 3 Brown P. C. Toml, ed. 454; 2 Jarman on Wills, 21; 2 Mer. 348. So, in reference to personal property: if a bequest be so uncertain that it is void, the next of kin will take, although it be apparent that the testator did not intend that the property should go to any other use than that named in the will. Williams v. Kershaw, 5 Clark & Finly, 111; 3 Leigh, 450. Indeed, to defeat the heir at law or the distributees under the statute, the property must be disposed of by will, and mere words of exclusion, without a disposition of the property, cannot have that effect, for the property not being devised or bequeathed, the statute then designates who shall take.

In the case before us, there is some property not disposed of by the will; that portion, therefore, must be distributed according to our statute of distribution, and as Mrs. Denson is one of the distributees of the testator, she is entitled to a distributive share.

This is the only question we feel at liberty to decide in the present condition of the cause; and as the ruling of the court was opposed to the view we take of the law governing the case, the decree must be reversed, and the cause remanded.

RHODES, EXECUTOR *vs.* TURNER AND WIFE.

1. The auditing and stating of an executor's account is a necessary preliminary to a final settlement; and in all cases, both before and since the passage of the act of 1843, the account *as stated*, whether by the executor or by the court, should lie over, and be presented for allowance at a subsequent term, of which at least forty days' notice should be given.
2. A final decree of settlement should be definitive as to all the liabilities of the executor to the estate, and should award distribution of the entire fund in his hands, having all the distributees before it.
3. A decree rendered by the Orphans' Court, upon the application of an executor, by which an amount is ascertained to be in his hands, a portion of which he is ordered to pay over to those entitled to it, and to retain the balance until the further order of the court, is not a final decree; but it may well be regarded as an interlocutory decree, and, being *prima facie* correct, unless impeached for errors or mistakes, may be made the basis of a final decree.
4. At the common law, the lapse of seventeen years would not be sufficient to raise the presumption of payment by an executor, of the amount ascertained to be due to the legatees upon a settlement of his testator's estate; and the statutes of this State fix no period, as a limitation to proceedings in the Orphans' Court against an executor or administrator, to compel a final settlement. The statute prescribing six years, as a limitation to actions at law for an account, does not apply; for the court has the administration of the estate in progress, and the proceedings before it must be considered as *in fieri*, until the final settlement and discharge of the executor.
5. But, according to the principles of the common law, a final judgment would be presumed to have been paid after the expiration of twenty years; and if the parties allow this period to elapse without taking any steps to compel a settlement from an executor or administrator, the presumption of payment arises in his favor; and this period would date from the time when he might have been called to a settlement.

ERROR to the Court of Probate of Mobile.

WM. G. JONES, for plaintiff in error:

1. In 1831, Rhodes made a full settlement of his accounts as executor; it was so considered and acted on by the parties and the court. In 1832, at the instance of the defendant in error, Emily, by her guardian, Arrington, Rhodes is ordered to pay to the guardian, Arrington, the amount ascertained in his hands.

In 1833, Rhodes resigns his executorship, stating he has made a final settlement. This is accepted by the court, and an administrator *de bonis non* appointed. Rhodes, it is said,

moved from the State; near seventeen years elapse, and then, without any notice to him, this *ex parte* decree is made against him. The bare statement of the facts and dates, is enough to show the error and iniquity of the proceeding.

2. The Probate Court had no jurisdiction of the application of Turner and his wife. Rhodes had, seventeen years before, settled his accounts and resigned his office, and moved off from the State, and an administrator *de bonis non* been appointed.

3. It is an old and stale demand. After the settlement and decree nothing was done for more than eighteen years. This was more than sufficient to bar any action of debt, assumpsit, covenant, or account, by the statute of limitations. By analogy, and by the principles of equity against stale demands, no court of law or equity would support this claim. 2 Story's Eq. 981, § 1520. If the Probate Court be considered as acting as a court of law in this matter, the statute of limitations would apply to the case; if as acting as a court of equity, the laches of the plaintiffs and the staleness of the demand would be equally fatal to it. For the manner in which our courts have adopted and applied this equitable doctrine, see particularly Wood v. Wood, 3 Ala. 756.

It appears from the record, that the plaintiff, Emily, is a legatee of the deceased; there is nothing to show that she has been always under a disability to sue; she might have sued at law for her legacy, but she is barred at law by the limitation of six years, and the remedy being concurrent in law and equity, the same lapse of time bars her remedy in equity. Wood v. Wood, 3 Ala. 762.

4. This proceeding is probably founded on the statute of 1843, Clay's Dig. 230, § 47. If so, it is not in conformity with the provisions of that act, and the proceedings being *ex parte*, against a man never served with notice or brought into court by process, should be strictly according to law. The court could not proceed until it was shown that Rhodes had removed from the State. There was no other showing of this than the statement in the petition, which one of the petitioners verified, not positively, but by saying he believed it to be true. It is submitted that this should have been shown by other evidence, or, at all events, a positive oath of

the petitioner. The act only authorizes this proceeding where the executor has removed without having settled his accounts. Here Rhodes had settled his accounts. The petitioners themselves admit it, by claiming the specific sum ascertained by the settlement, and also by the court. The statute directs, that on the failure of the executor to appear, &c., the judge shall state an account, charging him, &c. Here the judge stated no account. He authorized the petitioners to state an account; and the account stated, instead of being an account of his administration, as the statute requires, simply charges him with one-half of a specific sum, said to have been ascertained to be in his hands, by a former decree.

After stating the account, the statute requires the judge to proceed as now required by law. The law required forty days' notice. The account was stated 10th February, 1851, and the final decree made on it the 12th February, 1851, only two days afterwards, and without any notice. This was contrary to law. Under the proviso in § 47, Clay's Dig. 130, the executor had a right to these forty days' notice, to object to the account as stated, or to file an account of his own.

It also appears that Mrs. Arrington was an heir and legatee of the decedent. No decree could be made until she, if living, or her representative, if dead, was before the court. Crothers v. Ross, 17 Ala. 816, and cases there cited.

GEO. N. STEWART, *contra:*

1. There were funds in the executor's hands: Has the distributive share of Emily Howell ever been paid? If it has, it could readily be proved by the production of a receipt. It devolves on Rhodes to prove payment. All payments must be strictly proved. But there is no evidence of payment. The assertion in the written resignation, that he had paid over all funds to S. Acre, attorney for Arrington, is no evidence. It is but his assertion, but not admitted by the court, or by any one. The court accepted the resignation, but nothing more, and appointed another administrator. The legacy, then, never was paid, and no payment is shown or proved.

2. It is next said that it is a stale demand, barred by limitations, or something of that kind. To this, we answer: 1. A

legacy is never barred by limitation. 2. The legatee was an infant, and could make no claim. 3. The defendant left the State, wholly neglecting his duty to account, and was a non-resident. 4. The debt appears of record, on his own showing recorded, and the record shows his default and neglect of duty from beginning to end, and he resigned to avoid being removed. 5. Limitation is not pleaded.

3. It is said the account should have been published forty days after being stated. This has no application to a case like this. That rule applies to accounts presented by the administrator, and is to give to the creditors and legatees an opportunity to contest them. The reason fails here. The decree here is predicated on the showing of the administrator himself, found on record. He makes default, and the record itself merely is confirmed against him. He cannot object to this.

4. It is said the decree is partial only, and not final, being for the share of one legatee only. We do not know if the other has been paid or not. The statute contemplates a separate judgment and execution in favor of each legatee. Besides, if the objection be a good one, the writ of error will not lie, for it can only lie on a final judgment. Quere, does the writ of error lie in this case?

5. As to the interest, our law is, that interest is chargable of course, unless the administrator purges himself of it by his own oath. Clay's Digest, 198, § 28. Here he contests and denies the right; pretends payment falsely. Interest goes of couse. Legacies bear interest.

The defendant was chargeable, as we say, with a much larger amount, if we went into the account. But so as to avoid delay and controversy, we have taken a decree, only for what appeared of record to be due on his own showing, supposing there could be no objection on his part to this. Due proof was made before the judge of the Orphans's Court, of all the facts necessary to show the right to the decree rendered. The proceeding was under the statute. Clay's Dig. 230, § 47.

CHILTON, J.—The plaintiff in error having, as executor, taken upon himself the execution of the will of William H.

Howell, deceased, on the 8th April, 1831, filed his accounts and vouchers in the Orphans' Court of Mobile, which had granted him letters testamentary, for a settlement of the estate. A day was appointed and publication duly ordered, for all parties interested to appear and show cause why the account should not be allowed.

On the day thus set apart, viz: on the 30th May, 1831, it was ordered, that the executor "pay all the claims which are marked passed on his exhibit, and also, those therein marked as suspended, if proved in sixty days, which time is allowed for proving said suspended claims;" and it was ordered, "that all other claims on said exhibit be rejected," and that "the said executor pay over to those legally authorized to receive the same, the sum of two hundred and thirty-one $\frac{5}{100}$ dollars, that being the balance of said assets admitted in said exhibit, after paying the privileged and ordinary debts as allowed by this court."

Afterwards, on the 26th day of April, 1832, a citation was issued to the executor, requiring him to appear before the county judge on the 28th of the same month, to show cause why he should not be decreed by said court to pay over to Joseph Arrington, husband of Lucy M., (late Lucy M. Howell,) and guardian, in right of his said wife, to Emily Howell, the said Lucy and Emily being legatees under the will of William H. Howell, deceased, the moneys in his hands as executor of said will, remaining after final settlement of the estate of said Howell.

The executor appeared in obedience to this citation, and it was ordered, "that he pay over to said Joseph Arrington, the sum of two hundred and thirty-one $\frac{58}{100}$ dollars, and also the sum of ninety-three dollars, that being the amount of suspended claims not proved within the time heretofore limited by the order of this court, deducting the sum of one hundred and ninety-one $\frac{14}{100}$ dollars, which said executor claims the right to retain in his hands, and which is to remain subject to the further order of this court."

Nothing further appears to have been done, until the 27th August, 1833, when Wm. J. Bettis applied to the Orphans' Court, to have Rhodes, the executor, removed, and himself appointed as administrator *cum test. annexo*, &c. Citation was

accordingly issued, returnable on the 16th September, 1833.

On the 8th September, 1833, Rhodes made a written resignation, which he sent to the Orphans' Court judge, in which he stated, that he "had long since made a settlement of said estate, and paid over all funds to Samuel Acre, Esq., of Mobile, attorney for Doctor Arrington," &c.

This resignation was filed on the 17th October, 1833, and "accepted" by the court, and, thereupon, Bettis was appointed administrator.

Here the matter rested until the 1st October, 1850, a period of seventeen years, lacking a few days, when application was made by Samuel M. Turner, who had married Emily Howell, for citation requiring Rhodes to come forward and make final settlement; setting forth the fact of his residence beyond the State, and praying publication. An order for settlement and publication was accordingly granted.

On the 13th January, 1851, Rhodes not appearing, it was ordered that Turner and wife state an account *ex parte*, which was done, charging the executor with one-half of the amount of money remaining in his hands, as per settlement with said court, on the 28th day of April, 1832, $162.26, which, with interest from that period until the 10th February, 1851, made the sum of $406.27; and the court proceeded to render final judgment against Rhodes for this sum.

To reverse this judgment, the executor brings the case to this court, and insists, 1. That the length of time was a bar to any proceeding against him. 2. That, if it was not, the executor had no notice, as required by the statute, as to when the account should be allowed. 3. That there was a final settlement, which was conclusive upon the parties, and consequently no subsequent proceedings for another settlement could be entertained; and, 4. That the judgment should have been in favor of all the distributees, so as to make the settlement final, and not in favor of one, leaving the other to bring the executor to another settlement.

1. The act of 1843, Clay's Dig. 230, § 47, authorizes the Probate Court, when an executor or administrator, &c., removes beyond the jurisdiction of the county granting letters testamentary, or of administration, upon the application of any one interested, to cause notice to be given, by advertise-

ment in some newspaper published in this State, requiring such executor, &c., to file his accounts and vouchers for settlement at a regular term of said court, to be holden not less than three months from the date of said notice; and if the executor, &c., fail to appear and state his accounts, &c., the judge may state the account *ex parte*, charging the executor with such amounts as shall appear, upon the best information, to have come into his hands, and proceed to settle and decree upon the same, "as now required by law." The law to which reference is made in this act, is doubtless the act of 1806, which required the judge of the Orphans' Court, when the executor presented his account, &c., for final settlement, to audit said account, and after causing it to be properly stated, to report it to the next term for final settlement; the executor being required to give at least forty days' notice of his intention of having such account presented for allowance at such term, by posting up notice thereof in three of the most public places in the county, or advertising three weeks in some newspaper, &c. Aik. Dig. 182, § 27.

This statute was so amended by the act of 1822, as to require the judge, instead of the executor, &c., to cause notice to be published, and authorizing him to render judgment for the printer's fees. Aik. Dig. 252, § 33.

We think, it is very apparent from the several statutes then in existence, that the account, whether stated by the executor, or by the court in his absence, should lie over, and be presented for allowance at a subsequent term, and that at least forty days' notice should be given, of having said account allowed at the term to which it is referred. This notice, it has been several times decided, was required, that the parties interested should have an opportunity afforded them of examining and contesting the account. Legatees of Horn v. Grayson, 7 Porter, 270; Douthit v. Douthit, 1 Ala. 594; Parks v. Stonum, 8 ib. 752. The stating the account is a necessary preliminary to the final settlement, but after it is stated, it is open to exception until allowed on final settlement. *Ibid.;* see, also, Hall v. Wilson's Heirs, 14 Ala. 295, 301.

Indeed, the act of 1843, under which the petitioners proceeded, clearly indicates, that the executor shall have an

opportunity of contesting the account, as stated, by allowing him to come in at any time before the final decree, and by paying the cost, and filing his accounts and vouchers, to have the *ex parte* proceedings set aside, in which event the court is required to audit and state the account for allowance, as required by the previous law.

2. In this case, instead of stating the account between the estate and the executor, so as to pronounce a final decree concluding all the parties, and awarding to each legatee his share, the court allowed one of the alleged legatees to make out a partial account, embracing only one-half of the supposed balance in the hands of the executor, and leaving the remainder undisposed of by the decree. A final decree, as the term imports, should be definitive as to all the liabilities of the executor to the estate, and should also award the distribution of the fund, having all the distributees before it. Boyett v. Kerr, 7 Ala. 9; Crothers, Adm'r. v. The Heirs of Ross, 17 Ala. 816, 822; Clay's Dig. 304.

Again: this decree was rendered two days after the account was stated, and, of course, without the forty days' notice required by the act we have cited. This was clearly erroneous.

As the case must go back, it is necessary that we notice the other points which will likely arise upon another trial.

3. The record fails to show a decree finally settling this estate. True, an amount is ascertained to be in the executor's hands, upon his application for a settlement, and he is ordered to pay over a portion of the fund, but the balance is ordered to be retained by him until the further order of the court. We think the Probate Judge may properly regard this as an interlocutory decree, and being *prima facie* evidence of its correctness, unless impeached for errors or mistakes, the judge may well make this accounting the basis of his final decree, as he appears to have done.

4. The time which elapsed in this case was not sufficient, at the common law, to have raised the presumption of payment by the executor, of the amount due the legatees upon a settlement of the estate, and our statutes fix no period as a limitation to proceedings against an executor or administrator in the Orphans' Court, to compel him to come to a final

settlement. We do not think that the six years' statute, prescribed as the limitation to actions at law for an account, and which, by analogy, the Chancery Court adopts, can apply; for the court here has the administration of the estate in progress, and the proceedings before it must be considered as *in fieri* until the final settlement and discharge of the executor. It must not, however, be understood that there is no limit within which a party must be required to invoke the aid of the court, in compelling the administrator or executor to a settlement.

If a final judgment had been rendered, according to the principles of the common law, it would be presumed to have been paid after the expiration of twenty years; and if the parties allow this period to elapse without taking any steps to compel a settlement, we think the presumption of payment arises, and the executor or administrator should be exempted from the necessity of hunting up evidence to prove accounts and vouchers which ordinarily enter into such settlements, and which, after such a lapse of time, it would perhaps, in most cases, be impossible for him to obtain. This period of twenty years, we apprehend, would date from the time when the administrator or executor might have been called to a final settlement of the estate.

Let the decree be reversed, and the cause remanded.

SKAINS AND LEWIS *vs.* THE STATE.

1. When two are indicted for an affray, proof "that several months before the occurrence of the affray, they had fought together, on which occasion one had attempted to strike the other, and said he would kill him if he could get at him," is not admissible evidence against the one making the threat, when there is no proof connecting this rencounter with the affray for which the parties were on trial, or showing that the latter grew out of the former.
2. The eighth section of the third chapter of the Penal Code, (Clay's Digest. 413, § 8,) was intended to create a new offence, and attach to it a new penalty; and before the penalty denounced by it against the offender can be inflicted, the indictment must be framed in reference to the statute, and conform to its letter or substance.

3. When two are indicted for an affray at common law, it is erroneous for the court, by its instructions to the jury, to take away or limit their discretion with regard to the amount of the fine to be assessed in the event of a conviction.
4. When there is a conflict in the testimony, a charge upon the facts of the case, which assumes the contested fact as proved, invades the province of the jury, and is properly refused.

ERROR to the Circuit Court of Butler.

Tried before the Hon. E. PICKENS.

The plaintiffs in error were indicted in the Circuit Court of Butler County for an affray, and on the trial, each of them excepted to the ruling of the court, and two bills of exceptions are found in the record.

From the bill of exceptions taken by Lewis, it appears, that proof was introduced which tended to show, that the defendants had a difficulty and a quarrel, in a grocery, a crowd of persons being assembled at the time. The proof also tended to show, that the house belonged to Lewis, and that the difficulty occurred in the house; that Lewis ordered the defendant, Skains, out of the house, but he refused to go, and threatened to whip Lewis; that Lewis was behind the counter, and took a gun, and cocked and presented it at Skains; that one Staggers, who was present in the grog shop, told him not to shoot; that Lewis then raised the muzzle of the gun above the range of Skains, and while it was so raised, it went off, the shot going into the roof of the house, entirely above the head of the defendant, Skains. The proof also tended to show, that Skains, about the time Lewis's gun fired, was getting a gun to shoot Lewis, and immediately after Lewis had fired, Skains shot at him. Several persons were present in the house at the time of the shooting.

Upon this proof, the court, after charging the law in relation to affrays, charged the jury, that if they found the defendants guilty of an affray, an assemblage of people being present, and found, also, that fire-arms were used, not in self-defence, they could not fine either of the defendants less than one hundred dollars, and might fine them five hundred, or imprison them six months. To this charge, the defendant, Lewis, excepted, and asked the court to charge the jury, that

if they found from the evidence that there was no attempt to shoot by Lewis, and that the gun went off without his intending it at the time, and the load went into the roof of the house, not in the direction of Skains, this would not constitute an assault by Lewis; which charge the judge gave, but with this qualification, that if Lewis intended to shoot, and the gun went off before he was ready, it would amount to an assault. To the refusal to give the charge asked without the qualification, the defendant, Lewis, excepted, and also excepted to the qualification given.

In the bill of exceptions taken by Skains, it appears, that the proof tended to show, that the defendants were at a house owned by Lewis, and used by him as a grocery; that many other persons were there at a justice's court; and that while they were there, in the house, a quarrel arose between the defendants, which commenced out of the house; Skains followed Lewis into the house; thereupon Lewis ordered Skains to go out of the house, and the latter started to go out, and while he was going towards the door, in an opposite direction from Lewis, the latter picked up his gun, which was loaded, and cocked, and presented it at Skains, upon which Skains sprang to the corner of the house near him, where a gun happened to be standing; and about this time, while Lewis was lowering his gun, as if again to point it, it fired considerably above the head of Skains, who was turning towards Lewis, and immediately after Lewis fired, Skains also fired his gun in the direction of Lewis. The proof also tended to show, that before Skains started out of the house, he told Lewis repeatedly that, if he would go out with him, he would whip him, manifesting a wish to fight. On this state of proof, the counsel for Skains asked the court to charge the jury, that, although they should find, from the proof, that Skains told Lewis that if he would go out of the house he would whip him, yet, if Skains started to go out of the house when ordered by Lewis, and while going out from where Lewis was, the latter drew and presented a loaded and cocked gun at him, that then Skains had a right to take up a gun which was near him and defend himself; which charge was refused, and Skains excepted.

The court then charged the jury as stated in the first

charge mentioned in the bill of exceptions of Lewis, to which Skains also excepted.

On the trial, the defendant, Lewis, offered to prove by a witness, that, several months prior to the affray at the grocery, the defendants had fought, and in that fight Skains attempted to strike Lewis with a piece of iron, and said if he could get at him he would kill him. This was said while Lewis was loading a musket. Skains objected to the introduction of this proof, unless it was directly connected with the affray for which they were then on trial. The court overruled the objection, and allowed the proof to go to the jury; to which Skains, by his counsel, objected.

The plaintiffs now severally assign errors. The errors assigned by Skains, are:

1. The refusal to charge as requested by Skains' counsel;
2. The charge given;
3. The admission of the evidence of the former affray.

The errors assigned by Lewis, are:

1. The charge given by the court;
2. The refusal to charge as requested, without the qualification.
3. The qualification given to the charge asked.

J. F. JOHNSON, for Skains; and WATTS, JUDGE & JACKSON, for Lewis.

M. A. BALDWIN, Attorney General, for the State.

LIGON, J.—The record presents two bills of exceptions, taken by the defendants in the court below, when on trial on an indictment for an affray.

It appears by the bill of exceptions certified and sealed at the instance of the defendant, Skains, that his co-defendant, Lewis, offered to prove, that, several months before the occurrence of the affray for which they were then on trial, the defendants had fought together, when the former had attempted to strike the latter with a piece of iron, and said if he could get at him he would kill him. To the introduction of this proof, without connecting the remark used by him on that occasion with the affray for which he was then on trial, the defendant, Skains, by his counsel, objected. The objec-

tion was overruled by the court, and the testimony was allowed to go to the jury, to which Skains excepted.

I cannot perceive what connection the conduct and language of Skains on the former occasion could possibly have with the affray for which he was put on his trial in the court below. The language used by him contains no threat of what he would do in future, but is the mere expression of an angry man, debarred of present vengeance by the interposition of others, and spoken when the party using it was laboring under the excitement of recent conflict with his adversary. There is no proof whatever that connects this rencounter with the affray for which the parties were on trial, or that the latter grew out of the former. The two crimes are distinct from, and independent of each other, and if it was desired to punish Skains for his conduct on the occasion of the first fight between himself and Lewis, he should have been indicted for it; but it is not allowable to prove it, for the purpose of aggravating the fine in a case with which it had no connection, and as to which all proof concerning it would be wholly irrelevant. That it did aggravate the fine of Skains in the case under consideration, we think is conclusively shown by the finding of the jury; for the difference in the amount of his fine, and that assessed against Lewis, can be reasonably accounted for on no other hypothesis.

We think, also, that the first charge set out in both bills of exceptions, cannot be supported under the indictment in this case. The statute in reference to which the charge is given, is in these words: "If any person shall be guilty of fighting in the streets of any city or town, or at any militia muster, or other place public in itself, or made public by any assemblage of people for any purpose whatever, and shall employ or use, during such fight, any fire arms or air gun, by discharging or attempting to discharge the same, unless in self-defence, such person shall, on conviction thereof, be fined in a sum not less than one hundred, nor more than five hundred dollars, or be imprisoned in the county jail for a term not exceeding six months, or both, at the discretion of the jury trying such offence." Clay's Dig. 413, § 8.

It is evident, from the language of this act, that the Legislature intended to create a new offence, and attach to it a new

penalty; when this is the case, the indictment must be framed in reference to the statute, and conform either to its letter or substance, before the penalty denounced against the offender can be inflicted. State v. Click, 2 Ala. 16; State v. Mahan, ib. 340; Worrell v. State, 12 ib. 732; State v. Bullock, 13 ib. 413.

The indictment in the case under consideration, is in the ordinary form of an indictment at common law for an affray, and was never intended by the pleader to be conformed to the provisions of the statute above cited. It was, therefore, clearly erroneous for the court, by its instructions to the jury, to take away or limit their discretion with regard to the amount of the fine to be assessed in the event of conviction.

As to the charge requested by Skains, it was rightly refused, for the reason that it is a charge upon the facts of the case, and, if given, would have invaded the province of the jury, to which alone belongs the right to weigh the testimony and draw deductions and inferences from it, especially where there is a conflict in the testimony, as in the present case. In such cases the court cannot assume, by its charge, that the contested fact is proved; the jury must judge of the credit of the witnesses, and settle that question for themselves.

The only remaining question in the case, involves the exceptions of Lewis to the charge asked for by him, and given, with a qualification, by the court. That charge is couched in such terms, that we cannot agree upon what interpretation should be given it, and, consequently, we express no opinion in reference to it.

For the error in allowing the proof objected to by Skains, as recited in his bill of exceptions, to go to the jury, and in the charge excepted to by both defendants below, the judgment must be reversed, and the cause remanded.

ST. JOHN, POWERS & CO. *vs.* THE MAYOR, ALDERMEN, &c. OF MOBILE.

1. The *cash capital* of a commercial firm, whose business "comprehends the purchase of cotton upon commission, the buying of bills of exchange (generally based upon cotton,) upon domestic and foreign places, upon which said bills of exchange and cotton they draw and sell their own bills of exchange," *is that much cash in gold or silver, ready at hand in the strong box, to be paid out for cotton purchased on commission, or in the purchase of bills of exchange;* and this "cash capital" comes under the description of "personal estate."
2. When the partners of such a firm reside in the same city in which they have their place of business, the locality of the capital on which their business is conducted is the same as the domicil of its owners.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

The assessors of the city taxes of Mobile made an assessment upon the "cash capital" of the plaintiffs in error, "who are bankers and dealers in exchange," and returned it as "merchandize." The plaintiffs in error objected to this assessment, upon the ground that it was wholly unauthorized, by the facts, and by the law. Thereupon the City Council, for the purpose of avoiding the expense and delay of a suit at law, passed a resolution, authorizing their attorney to agree upon a statement of the facts with the counsel for the plaintiffs in error, and to have the same presented to the court, in the form of a motion by consent of parties, to test the legality of the assessment.

A motion was accordingly made by the plaintiffs in error, in the City Court of Mobile, to be relieved from the payment of the taxes assessed against them; and the case was submitted to the decision of the court, upon the following agreed state of facts:

"It is agreed, that the plaintiffs are a firm in the city of Mobile, resident citizens of said place, and doing business; that their business, strictly speaking, is that of commission merchants; that this business comprehends the purchase of cotton upon commission, the buying of bills of exchange

(generally based upon cotton,) upon domestic and foreign places, upon which said bills of exchange and cotton, plaintiffs draw and sell their own bills of exchange; that they have a cash capital of $50,000, which is thus employed, and which is, from time to time, re-invested in the manner aforesaid, in said city of Mobile; that during the municipal year, 1851, the duly and legally qualified assessors of the city taxes of and for the said city, called upon the said firm, for an account of their property for assessment; all of which, of every name, nature or quality, was given in, as the subject of taxation, except the said cash capital, whether the same was on hand in money, or invested in bills aforesaid, which plaintiffs insisted was not subject to taxation, under the statutes regulating that matter in Mobile; yet said assessors, believing they had the right so to do, assessed the said cash capital, and set the same down in their assessment books, which they returned to said city for said year, styling the same "merchandize;" that the rate of tax assessed upon the said capital so employed, was the same as for personal property in the city of Mobile; and that the aggregate amount of tax assessed upon said capital was $; that said assessment books were duly returned to said corporation, and that objections to said assessment were duly filed with the proper authorities of said corporation, by the plaintiffs. And the parties agree, that the court may render a judgment upon these facts. If judgment shall be for plaintiffs, it shall be for costs, and shall be a bar to the collection of said tax, so assessed as aforesaid; and if the same shall be for defendants, it may be for the amount of said tax and for costs."

Upon these facts, the court decided the motion in favor of the defendants, and rendered judgment accordingly; from which judgment, the plaintiffs prayed an appeal.

By the charter of the city of Mobile (Acts of 1844, 182,) it is declared "that the Mayor, Aldermen and Common Council shall have power to lay taxes, on both real and personal estate within said city, as well as a poll tax upon all of the inhabitants." A joint resolution, adopted by the corporate authorities of the city, on the 15th of April, 1850, fixing the rate of taxation in the assessment of 1850, is in these words: "*Resolved:* That the rate of taxation, for the present munici-

pal year, be fixed at forty cents on every hundred dollars' worth of property liable to taxation."

TAYLOR & HITCHCOCK, for plaintiffs.

JOHN A. CAMPBELL, *contra.*

PHELAN, J.—The only question to be determined is, whether the capital of a commercial firm in the city of Mobile, employed by them at that place in purchasing cotton upon commission, and in buying and selling bills of exchange, comes under the discription of personal estate in the city of Mobile, liable to taxation for city purposes, under the charter of 1844.

What is the capital of such a firm, proposing to conduct such a business, if we reduce it to its simplest form? It is that much cash, in gold or silver, ready at hand in the strong box, to be paid out for cotton purchased on commission, or in the purchase of a bill of exchange. It may be true, that we would rarely find in fact the capital, either of a bank or a house doing a commission and banking business, in this form, even in the commencement of their business. But whatever other form the capital may take, that is the only one it can be held to have in reality. It is the only one which will answer the purpose of capital under every exigency. If such capital takes the form of bank notes, what we commonly call paper money, the seller of cotton or of a bill of exchange may refuse to take such paper money in payment, and will be content with nothing but actual cash, gold and silver coin, made lawful tender by the laws of the land. Unless then, in such an exigency, the paper money can be readily converted into the actual cash, which it purports to represent, the firm will be without the capital with which to make purchases and conduct their business. Whatever form then the capital of such a firm may take, whether it be bank notes, or the notes and bills of individuals, or public securities, it is all, when regarded as capital, to be considered as actual cash, or reduced to the value of actual cash, in gold and silver coin.

To say then that a firm, such as that of the plaintiffs in error, engaged in the business described, have, on a given day, employed in their business, fifty thousand dollars "cash cap-

ital," is to say that they have then fifty thousand dollars in actual gold and silver or its equivalent.

If this be true, that the capital of a banking house is to be regarded as so much actual cash, or gold and silver coin, it necessarily follows, that such capital comes under the description of property; and if property, then personal property of course, or personal estate, for the terms are convertible.

The only question that remains to be considered is, whether it is personal property or estate in the city of Mobile; because that is the condition on which alone it is taxable under the charter.

What, in other words, is the locality of this property?—this capital? If, as the facts show, the plaintiffs in error reside in Mobile, have their office, their place of business in that city, can it with any show of reason be pretended that the locality of the fund on which the business is conducted, is not the same as the seat of the business, and the domicil of its owners? We must hold that they are the same. Portions of this fund—this capital, may be at points far distant, at New York or Liverpool for instance, in the shape of bills of exchange running to maturity and payable at those places, but by the regular course of business, these are only performing their appointed circuit, and will soon find their way back to the office in Mobile, ready to be sent forth again as the demands of business may require. The centre of all the operations is Mobile.

If one of the partners should go out of such a concern, and it had to be wound up by course of law, to what courts would the outgoing partner have to resort? To the courts of Mobile. If one of the partners dies, or if all should die, to what point will the common fund have to be brought for distribution? To the Probate Court of Mobile, the domicil of the decedents.

When, therefore, all the means and appliances for the employment of this capital, and its protection for the benefit of the owners while living, and for its management and distribution when they die, are found to have their locality in the city of Mobile, the capital itself may justly and properly be held to be taxable as personal property in the city of Mobile.

By way of strengthening this construction of the terms

"personal estate," as they occur in the city charter of 1844, we may remark, that the General Assembly of 1847, (Acts, p. 3,) in the revenue act of that session, define the terms real estate and personal estate, as connected with the subject of taxation, and under the terms "personal estate," or "personal property," (which they use as equivalents,) they include, among other things, all "moneys and effects wherever they may be." And in section 80, page 25, of the same act, they go on to levy a tax of one third of one per cent, "upon the 'capital employed' in a regular exchange business."

If we were left to construe the charter of 1844, without looking to this statute subsequently passed by the same legislature at all, we should not hesitate to say, that the cash capital of a house doing a commission and exchange business came fairly within the discription of personal estate, or personal property liable to taxation under that charter; but we nevertheless think it persuasive to show that such cash capital fell impliedly within the discription of personal estate, liable to taxation in 1844, that the same legislature expressly declared it to be such, in 1847.

Let the judgment be affirmed.

THE SCHOONER SOUTHRON *vs.* O'RILEY.

1. The courts of this State can proceed by admiralty process to enforce the collection of such debts only as constitute a lien on the vessel; and if the debt creates no lien, or if has been lost or discharged, the court has no jurisdiction to proceed.
2. Under the decisions of this State, the court may look to the items of the account attached to the libel, to determine whether they constitute a lien on the vessel.
3. But when the libel shows that the entire debt constitutes a lien on the vessel, and the account attached may be construed consistently with the libel, the Appellate Court will not, especially after a final decree, construe the account in such a manner as to infer that the debt, or any part of it, does not constitute a lien on the vessel.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

James O'Riley filed a libel in the City Court of Mobile against the Schooner Southron, in which he alleged that, at the instance of the master, the libellant did, within the six months last preceding, work and labor as a shipwright in repairing and rebuilding said schooner, and did furnish materials to the amount of four hundred and fifty-six dollars, and that said work was done in the State of Alabama. Annexed to the libel is a statement of the account, as follows;

"The Schooner Southron and Owners,

To James O'Riley, Dr.

To eleven months and eight days work and labor done on board said Southron, at the monthly wages of forty dollars per month, - - $456 00"

Upon this libel process of seizure was issued, under which the sheriff attached the schooner. James Lombard, the master of the vessel, and Patrick O'Bryan and O. S. Jewett, gave bond conditioned to pay the judgment that should be rendered on said libel, and the vessel was released. Patrick O'Bryan intervened, and claimed the vessel, and, by way of answer, denied that the facts stated in the libel entitled the libellant to relief.

Upon the trial the court, holding the libel sufficient, decreed in favor of the libellant the sum of two hundred and seventy-five dollars, and rendered judgment against the stipulators for that amount.

O. S. JEWETT, for plaintiff in error:

The statutes of 1824 and 1836 are to be construed in *pari materia*, both containing operative provisions, and forming one system. Richardson v. Cleaveland, 5 P. 252; and the act of 1848 is not intended to repeal either. S. George v. Skates, et al., last term.

The account is part of the libel when attached to it, and referred to therein. 5 P. 251.

The decree in this case was for more than, by the libel, it appears that there could exist a lien for. Six months work, at $40, would be $240, but he has a decree for $275.

The libel must make such a case as will give a lien; as in common law, a declaration must make out a cause of action. Dunlap's Adm. Prac. 113.

P. HAMILTON, *contra:*

The defendant in error submits, that the demurrer to the libel was properly overruled. The libel contains all the allegations necessary to show jurisdiction over the case, as well as over the subject matter; it shows the demand was for labor and materials furnished to a water craft, a schooner, within six months before suit was brought, and within the State of Alabama. Clay's Dig. 139, §§ 22, 23; ib. 537, § 5. Stewart George v. Skates et al., June Term, 1851.

A Court of Admiralty is liberal in permitting amendments. The amendment allowed in this case, was entirely within the discretion of the court to grant. Dunlap's Adm. Practice, 211.

The decree as to the amount should be sustained. The decree shows it was rendered on proof satisfactory to the court. Although a larger sum was claimed, it was properly reduced in the decree, to the amount proved to be due within the statutory limitation of six months. The labor may have been done by libellant and his servant or apprentice. This court will not presume error.

The decree against the stipulators is correct. The claimant made his claim as owner, and pleaded in exception to the libel; this exception seems to have been sustained, and leave given libellant to amend. The motion to continue the cause, was addressed to the discretion of the court, and will not here be reviewed

No answer was filed to the libel; on the facts, it was altogether undefended, but proof was made of the debt, and decree of condemnation passed against the vessel. Thereupon, on suggestion that the vessel had been delivered to the claimant on his stipulation, and that the stipulators had bound themselves for the absolute payment of such decree as might be rendered upon the libel, a personal decree against the stipulators was rendered by the court. This proceeding was formal and regular, and no injury has been done the parties in the cause. 5 Por. 251; Wainwright & Twelves v. Sanders, this term.

DARGAN, C. J.—The libel claims four hundred and fifty-six dollars, for work and labor done and performed on the

schooner Southron, and for materials furnished within six months next preceding the filing thereof. A statement of the account is annexed, which is as follows:

"The Schooner Southron and Owners,

To James O'Riley, Dr.

To eleven months and eight days work and labor done on board said schooner, at forty dollars per month, - - - - - - - $456 00"

The decree is for two hundred and seventy-five dollars, but the evidence upon which it was rendered, is not made part of the record.

The case standing in this condition, it is contended that the decree is for more than it should have been, according to the allegations of the libel; because, under our statutes, all liens for work and labor done upon vessels, and for materials or stores purchased, must be enforced within six months from the time such labor is performed or the goods are purchased, and if not enforced within that time, the lien is discharged; and that two hundred and forty dollars is the largest amount that could constitute a lien on a vessel for work done at forty dollars per month. I admit, that our State courts can only proceed to enforce the collection of a debt against a vessel by way of admiralty process, that constitutes a lien on the ship or vessel; and if the debt creates no lien, or if it has been lost or discharged, the court has no jurisdiction to proceed in this manner. Wainwright & Twelves v. Sanders, decided at the last term. I further admit, at least under our decisions, that we may look to the items of the account attached to the libel, to determine whether they are such as do constitute a lien on the vessel. Richardson v. Cleaveland, 5 Por. 251. But, with these admissions, I am not prepared to say, that any portion of the account does not constitute a lien on the schooner. The libel alleges, the work was done within six months from the time of filing the same, and there are no dates to the account showing when the work was done. The entire account consists of one item or charge, and that is of eleven months and eight days work done on the schooner, at forty dollars per month. This may be true, at least substantially, and still the work may have been done within six months, for it may have been done by the libellant and his servants;

and if so, the entire debt may well constitute a lien on the vessel.

The rule of law is, that error is never to be presumed, but the party complaining of it must show it. This could have been readily done in the case before us, by making the evidence part of the record, from which it would have clearly appeared whether or not the lien of any part of the account had been lost. The omission to do this, is an argument against the plaintiff in error, and rather tends to prove that the evidence would have shown that the entire debt did constitute a lien on the vessel. Be this as it may, when a party fails to except to the evidence, and thereby make it a part of the record, and relies on the items of the account attached to the libel, in order to show that the debt does not constitute a lien on the vessel, the account must clearly and conclusively show that no lien ever existed, or, if it once did, that it has been lost; and if, from the account, it can be inferred that the debt might constitute a lien on the vessel, we will not reverse the decree, on the supposition that no lien in fact existed. We would rather infer that the account was not made out with precision and accuracy, if it could be construed consistently with the libel and decree, than that the court erred upon the evidence, which is not brought before us.

Let the decree be affirmed.

BARNES & BARNES *vs.* MOBLEY.

1. When the court below charges the jury, that, if they believe all the proof, the plaintiff is not entitled to recover, the plaintiff, wishing to revise the charge in the Appellate Court, must set out in the bill of exceptions all the evidence upon which it was predicated.
2. When the defendant in trover fails to give any account of the manner in which he acquired possession of the slave in controversy, he will be presumed, in the absence of all rebutting proof, to hold from or under the person who is shown to have had the possession for several years next before the defendant acquired it.
3. The declarations of one who is in possession of personal property, in disparagement of his own title, or repudiating title in himself, are competent evi-

dence against himself, or against a subsequent purchaser from him, or one claiming to hold under him.

4. The declaration of one in possession of a slave, *made at the time of hiring* her to the witness, "that the slave belonged to the plaintiffs, who were minors and orphans," is admissible evidence for the plaintiffs, in an action of trover subsequently instituted by them for her conversion against a third person, as showing that he was but the plaintiffs' bailee, and held the slave in that capacity, in subordination to their title, and not adversely to them.

ERROR to the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

This was an action of trover by the plaintiffs against the defendant, to recover damages for the conversion of a negro woman slave, alleged to have been the property of the plaintiffs. Plea, not guilty, with leave to give evidence of any matter which would be legally received under any special plea in bar; verdict and judgment for the defendant.

On the trial, a bill of exceptions was sealed, from which it appears, that the plaintiffs introduced proof tending to show, that their father (John Barnes) intermarried with their mother, who was the daughter of one Jethro Mobley, in the year 1823, which marriage was solemnized in the State of Georgia, and that immediately upon said marriage, said Jethro Mobley gave the negro slave in controversy to his said daughter; that said slave continued in the possession of the plaintiffs' father until the death of their mother, which happened in Georgia, in 1830; that their father, for the first two or three years next succeeding his marriage, resided near his father-in-law, Mobley, but afterwards removed to Merriwether county, Georgia, where he remained in possession of said slave until his wife's death. The plaintiffs further proved, that after the death of Mrs. Barnes in 1830, her father, Jethro Mobley, came from Butts county, Georgia, where he resided, to Merriwether, and proposed to the plaintiffs' father, that, if the latter would suffer him to take the plaintiffs, who were then of tender years, and the bed of their mother and the negro woman, he would raise and educate the plaintiffs, and keep the negro woman and her increase for them, and that when he died, he would give to the plaintiffs the share of his estate which would have gone to their deceased mother; that this proposition was assented to by the father of the plaintiffs,

and the plaintiffs and said property were thereupon delivered to said Jethro Mobley, their grandfather, who took them to the county of his residence; that after this agreement, the plaintiffs' father never had the possession of said slave, and never exercised any acts of ownership over her subsequently.

This agreement was afterwards repeated to several witnesses by said Mobley, while he had possession of the plaintiffs and said slave; and it was proved that said Mobley hired out said slave two years, for the benefit of the plaintiffs.

It appears, also, that the plaintiffs and the negro woman remained in said Mobley's possession from 1830 to 1834, or 1835; and that, in the latter part of 1835, or first of the year 1836, the slave was proved to have come into the possession of the defendant, who exercised acts of ownership over her, working her in the field with his other hands, and controlling her from the date above until 1844, or 1845, at which time said defendant sold her to one James Barr. It was conceded that, at the time of the sale to Barr, the plaintiffs had not attained the age of majority.

Plaintiffs then proved the value of the slave to have been from $600 to $700, while she was under defendant's control. It was shown that Jethro Mobley died in 1848, or 1849; and the plaintiffs offered to prove that, while said Mobley had the plaintiffs and the slave in his possession, viz: in 1834 or 1835, he stated to the witness, who was hiring the slave from him, "that she belonged to the plaintiffs, who were minors and orphans, and that he was hiring her out for their benefit." This declaration was objected to by the defendant, and the court excluded so much as related to the title to said slave, and the plaintiffs excepted.

This being all the proof, except the statute of frauds of the State of Georgia, the circuit judge charged the jury: that, if they believed the whole of the testimony, they should find for the defendant. To this charge the plaintiffs also excepted, and they here assign the matter of these two exceptions for error.

BARNES & ALLISON, for plaintiffs in error:

1. The bill of exceptions shows, that the father and mother of the plaintiffs intermarried in the year 1823; and that im-

mediately after the marriage Jethro Mobley, the father of plaintiffs' mother, gave her the slave in controversy. This was an absolute gift to her. Merriweather v. Eames, 17 Ala. 330; Olds v. Powell, 7 Ala. 650; Hill, *et al.* v. Duke, 6 Ala. 259.

2. Marriage operates as an absolute gift to the husband, of the personal chattels of the wife in her possession at the time of the marriage, and what may be reduced into possession during the marriage. Clancy on Rights, 152; Hooper v. McWhorter, 18 Ala. 279; Chambers v. Perry, 17 Ala. 726; Oneal v. Teague, 8 Ala. 345; McGehee v. Toland, 8 Porter 36; Bibb v. McKinley, 9 Porter 636.

3. The declarations of Jethro Mobley, made while he had possession of the slave, were admissible evidence, as tending to show the character and extent of his possession. McBride and wife v. Thompson, 8 Ala. 650; Thompson v. Mawhinney, 17 Ala. 362; Clealand v. Huey, *et al.*, 18 Ala. 343; Brazier & Co. v. Burt, 18 Ala. 201; Perry v. Graham, 18 Ala. 822; 17 Ala. 10; ib. 216; ib. 314; ib. 428; 10 ib. 430.

4. The terms of the agreement, the situation of the parties, the motive that led to it, the object to be attained by it, and the subsequent acts and declarations of Jethro Mobley, as shown by the bill of exceptions, show that the parties intended the title of the slave to vest in the plaintiffs, and that Jethro Mobley must have believed that plaintiffs' father believed, at the time he delivered the slave to him, that the title to the slave vested in plaintiffs, and that said Jethro Mobley had no interest in her, but only received her as plaintiffs' bailee; and this intention is the law of the case, and must be enforced. Chitty on Contracts, 74; Watts v. Sheppard, 2 Ala. 425; Strong v. Gregory, 19 Ala. 146. The delivery of the slave to Mobley, and the abandonment of possession and dominion by their father, vested the title to the slave in plaintiffs. McCutcheon v. McCutcheon, 9 Porter 650; 2 Ala. 669.

5. The evidence of the witness offered, and ruled out by the court, as shown by the bill of exceptions, was admissible, for the purpose of showing admissions made by Jethro Mobley, against his interest, which bound him and the defendant. 1 Greenleaf on Evidence, § 190; 4 Johns. Rep. 230; Nelson v. Iverson, 17 Ala. 216; Robertson v. Smith, 18 Ala. 220;

Head v. Shaver, 9 Ala. 791; McBride and wife v. Thompson, 8 Ala. 650.

6. If Jethro Mobley had any interest in or title to the slave, it was limited and special, and could not extend beyond the time when the plaintiffs became of age; and if he sold, or permitted the defendant to sell the slave, this was a conversion, and entitled the plaintiffs to sue for it. Tucker and wife v. McGehee, 18 Ala. 99; Whitlock v. Heard, 13 Ala. 776; Lee v. Matthews, 10 Ala. 682; Abercrombie v. Bradford, 16 Ala. 560; Hooks v. Smith, *et al.*, 18 Ala. 338; 1 Humphreys' R. 199.

RICE & BAUGH, *contra:*

1. A material part of the evidence, to-wit: the statute of frauds of Georgia, is not made a part of the bill of exceptions, although the bill of exceptions shows that this statute was read in evidence, and that the transactions under which the plaintiffs claim title occurred in Georgia. In the absence of that statute from the bill of exceptions, this court cannot say the court below erred in charging the jury, that if they believed all the testimony, they must find for the defendant. If necessary to sustain the charge, this court would intend that the statute of frauds of Georgia contained provisions which justified the charge of the court. Jones v. Stewart, 19 Ala. 701; Rhodes v. Sherrod, 9 Ala. 63.

2. The only other exception arises out of the offer of the testimony of Dr. C. C. Forbes, by the plaintiffs. This testimony of Forbes was offered as a whole, and as part of that testimony is clearly inadmissible and irrelevant, and mere hearsay, the court would not have committed an error if it had rejected the whole, Smith v. Zaner, 4 Ala. 99; Melton v. Troutman, 15 Ala. 535. But the court made a decision more favorable to plaintiff than he was entitled to by law. The court "excluded only what witness said about titles." There is certainly no error in the ruling of the court. McBride v. Thompson, 8 Ala. 650.

3. In the action of trover, the plaintiff cannot recover where the evidence shows an outstanding title in a third person.

4. The evidence does show an outstanding title in John Barnes, the father of plaintiffs, or in Jethro Mobley, their grandfather.

Immediately after the marriage of said John Barnes, his father-in-law (Jethro Mobley) gave the negro girl to the wife of said John Barnes. This gift vested the title in John Barnes.

The transaction which occurred after the death of the wife of said John Barnes, did not destroy or divest his title. It was not a gift to his children. Durett v. Sewell, 2 Ala. 669. That transaction was, at most, evidence of an intention to give. Sims v. Sims, 2 Ala.

That transaction is as follows: A short time after the death of the mother of the plaintiffs, the said Jethro Mobley and John Barnes, in Merriweather county, Georgia, had a conversation. Jethro told John that "if he would give him (Jethro) up the plaintiffs, the bed of plaintiffs' mother, and said negro, he (Jethro) would take the plaintiffs, raise and educate them, and keep the said negro and her increase for them," "and that when he died he would, in addition, give them their deceased mother's portion of his estate." Thereupon, the said John delivered up to said Jethro the negro, the bed and the plaintiffs; the said Jethro being the grandfather of plaintiffs.

Now, if it were conceded that this was a valid contract between Jethro and John, it was a contract by which Jethro acquired the right to the possession of said slave until he would raise and educate the plaintiffs; that is, until they, or one of them, arrived at the age of twenty-one years. A child cannot be considered as raised until it arrives at lawful age.

The defendant has never had possession or control of the slave since he sold the slave to Barr, in 1844 or 1845, and it was conceded on the trial that the plaintiffs, at the time of that sale, were not twenty-one years old.

It is, therefore, clear, that if the sale by defendant to Barr was a conversion, the plaintiffs cannot maintain trover for it, because they had no right at that time to the immediate possession of the slave. 1 Chitty's Pl. 152, 148, 149, 150.

The plaintiffs might possibly have maintained case, if any damage to their reversionary interest was done by that sale, but it is clear they cannot maintain trover, because they then had no right to the immediate possession.

If the sale by defendant to Barr was a conversion, the said Jethro Mobley might have maintained trover, unless he had

hired out the slave for a term then unexpired. It was not shown that defendant acquired the possession unlawfully.

The evidence presented the following obstacles to a recovery, to-wit: 1. At the time of the alleged conversion, (to-wit, the sale by defendant to Barr, in 1844 or 1845,) the plaintiffs did not have "a complete property, either general or special" in the slave. 1 Chitty's Pl. 148. 2. There is no proof of conversion. Hall v. Robinson, 2 Comstock's R. 293. 3. At the time of said alleged conversion, the plaintiffs did not have the actual possession, nor the right to the immediate possession. 1 Chitty's Pl. 148. 4. There was an outstanding title to the property, and to the immediate possession of it; which outstanding title continued at least until plaintiffs were raised and educated, for until then Jethro Mobley had the right to possess and control the slave.

CHILTON, J.—It is impossible for this court to say, that the Circuit Court erred in charging the jury, that, if they believed all the proof, the plaintiff was not entitled to recover; for the simple reason that all the proof is not set out in the bill of exceptions. It is shown that the statute of frauds of the State of Georgia was read in evidence, and constituted a portion of the proof on which the charge of the court was based.

We cannot judicially know, but that the statute referred to may fully justify the court in the charge, as the gift was made in that state, and the parties resided there when the plaintiffs' alleged title accrued. It is indispensable, when the party desires to review such charge as this, that the record should state all the proof upon which it was predicated, otherwise this court cannot say the court below acted contrary to law, as the data for such conclusion is not furnished by the bill of exceptions. It has been several times decided, that when the legality of the charge depends upon the proof, the party insisting upon its incorrectness must affirmatively show the error, by setting out the proof in the bill of exceptions. Brewer v. Strong, 10 Ala. 961; Greene v. Tims, 16 Ala. 742; Knapp v. McBride, 7 ib. 20; Jones v. Stewart, 19 Ala. 701.

2. We think the court misconstrued the application of the rule, that the declarations of a party in possession, explana-

tory of such possession as showing the character in which he held, are admissible only for that purpose, and cannot be allowed as proof of title, as settled in the case of McBride and wife v. Thompson, 8 Ala. 650, and asserted by several subsequent decisions.

The bill of exceptions does not distinctly state it, but there was some evidence afforded by the proximity of the possession of the defendant to that of Jethro Mobley, that the defendant derived his title, if any he had, from Mobley, or held in subordination to him. At all events, Mobley is proved to have been in possession of the slave for several years, and she goes from him to the defendant, who fails to give any account as to the manner in which he acquired the possession. Such being the case, the presumption, in the absence of all rebutting proof, is, that he acquired the possession from Mobley, the person proved to have had the possession next before the defendant acquired it. Holding, then, either as a purchaser from, or in subordination to the claim of Mobley, it is obvious that the declarations of the latter in disparagement of his own title, or repudiating title in himself, were competent evidence. 1 Greenl. Ev. § 190. They would have been good as against Jethro Mobley, and are equally good as against any one subsequently deriving title, or claiming to hold under him. Nelson v. Iverson, 17 Ala. pp. 221–2.

But we think the whole proof offered by Forbes admissible upon another ground. It must be borne in mind, that this is not the case of a party offering the declarations of himself or those under whom he claims, to sustain his title; but the declarations of a third person, found in the possession of the slave, and made while hiring her to the witness, the same being explanatory of, and probably forming an element in the contract of hiring, and tending to establish the part execution of a trust which had been conferred upon Jethro Mobley by the plaintiffs' father; namely, that he would take care of the slave for the plaintiffs, &c. The declaration of Mobley, at the time of hiring, "that the slave belonged to the plaintiffs, who were minors and orphans," showed that he was but the plaintiffs' bailee, and hired her in that capacity, and did not hold adversely, but in subordination to their title.

We repeat, that such declaration was unquestionably competent to show, that Mobley had no title, and to rebut any presumption or inference that the defendant derived any through him, if he held under him. See Oden v. Stubblefield, 4 Ala. 40; and cases in this court cited in 17 Ala. 222; 18 ib. 201, 343, 822.

We regret that the statute of frauds of the State of Georgia is not before us, so that we might settle the law upon the merits of this case, and thus save further litigation; but, as it is not, we forbear to express any opinion upon the law arising upon the partial statement of facts contained in the bill of exceptions.

As to the right of plaintiffs to sue by reason of the conversion, notwithstanding they may not have been entitled to the possession of the slave at the time, see Tucker v. Magee, 18 Ala. 101.

For the error above noticed, the judgment must be reversed, and the cause remanded.

FIELD *vs.* IRELAND.

1. An affidavit, made by the defendant, that certain goods of the value of thirty dollars, the property of certain persons named in the affidavit, had been feloniously stolen by some person or persons unknown to the affiant, and that, from probable cause, he suspected said goods were concealed in a trunk belonging to the plaintiff and another person, does not amount to a charge of larceny against the plaintiff, if he fails to account satisfactorily for his possession.
2. But such an affidavit is equivalent to a charge of knowingly concealing stolen goods, although it may not contain the statutory requisitions necessary to constitute that offence, and authorizes the justice to issue his warrant for the arrest of the person in whose possession the goods are alleged to be.
3. Actual force, or a manual touching of the body, is not necessary to constitute an arrest; it is sufficient, if the party is within the power of the officer, and submits.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

The declaration, which is for malicious prosecution, contains

two counts. The first, alleging that the plaintiff in error charged the defendant in error with having feloniously stolen goods and chattels, of a greater value than twenty dollars, from him, and upon such charge procured a warrant, upon which he was arrested, &c. The second count alleges a charge of felony, and the arrest of the defendant in error on that charge, his discharge, &c. On the trial, it was proved that the plaintiff in error made an affidavit before a justice of the peace, that certain goods, of the value of thirty dollars, the property of certain persons named in the affidavit, had, within sixty days then last past, been feloniously stolen, taken, and carried away, by some person or persons unknown to him; and that, from probable cause, he suspected such goods were concealed in a trunk belonging to the defendant in error and one James Ross, in the theatre, or in or about a boarding house in Emanuel street, and prayed for a warrant to search for the same; and that on the application thus made, the justice issued a warrant to a constable, directing him to search the places mentioned in the affidavit, for the goods specified, and on finding the same, to bring such goods, the defendant in error, and the said Ross, before him, to be dealt with according to law. The constable, on the search, found certain goods, which he returned to the justice. The defendant in error was not actually arrested on the warrant, but was met by the constable and informed that he had a warrant for him, upon which he came voluntarily with him before the justice, when an examination was had, and the defendant in error discharged.

The court charged, that the possession of goods proved to have been stolen, constitutes a larceny, unless they are accounted for by the person in whose possession they are found, and that the statement of facts contained in the affidavit of the plaintiff in error constituted a charge of larceny against the defendant in error, if the goods were found in his possession, and there was no evidence to show that any other person had the possession from the time they were stolen to the time they were found in his possession.

The following charges were requested, on the part of the plaintiff in error:

1. If the affidavit did not charge the defendant in error

with felony, or with having feloniously stolen articles of greater value than twenty dollars, that, although the warrant in question was issued by a justice of the peace, commanding a constable to arrest the defendant in error, and that thereupon he was arrested and brought before said justice, and by him examined and discharged, the warrant, not being authorized by the affidavit, was illegally issued, and the plaintiff in error not chargeable by reason of such affidavit, warrant, arrest and discharge, under either count;

2. That the affidavit did not charge the defendant in error with any crime; that the warrant of the justice was illegally issued thereon, and that the plaintiff in error was not liable under either count, by reason of acts done under color of said warrant by others;

3. That the warrant of the justice was not authorized by the affidavit;

4. That the affidavit, and the warrant thereon, would not subject the plaintiff in error to the action;

5. That if the defendant in error came voluntarily before the justice, and was not under any arrest, and in custody of an officer by reason of such warrant, his examination and discharge did not amount to a malicious prosecution under either count; which several charges were refused.

The charge of the court as given, and the refusal to charge as requested, were reserved, and are here assigned for error.

GEO. N. STEWART, for the plaintiff in error:

1. The affidavit did not charge Ireland with grand larceny, as charged in the first count, nor with felony, as charged in the second count. The affidavit expressly says, that the goods were stolen by persons unknown to affiant. It does not charge, that the goods were in the possession of Ireland, nor that the trunk was. Admitting every fact stated in the affidavit to be true, it would not necessarily follow that he had been guilty of any crime. The affidavit, then, did not authorize the arrest of Ireland, nor did it authorize the warrant for his conditional arrest. 2 Blackf. R., 259. The construction and legal effect of the affidavit was a question of law, and not of fact; and it was the duty of the court to construe it, and to say whether or not it authorized or required the arrest. 19 Ala., 331.

If the affidavit did not authorize the writ to arrest, and if the order to arrest was improperly issued by the justice, the party making the charge is not responsible for it. Bennet v. Black, 1 Stew., 39; Ewing v. Sanford, 19 Ala., 611. It is true, that it is not necessary for the charge to be made in the strict technical language which is required in an indictment; but it must specify some charge which would authorize the party's arrest.

2. The warrant was contingent, and the contingency did not happen; consequently the officer made no arrest. In cases for malicious prosecution, the declaration must show an arrest, and that it was under color of lawful process; and the process must be set forth in the declaration, and correctly described. Sheppard v. Furniss, 19 Ala., 764; 3 Blackf. R., 210. Of course, the proof must conform to the allegations of the declaration, else it is inadmissible. The voluntary appearance of Ireland before the justice was not equivalent to an arrest.

3. The charges of the court cannot be sustained. The court charged "that the possession of stolen goods constituted a larceny, unless they are accounted for by the person in whose possession they are found." This is incorrect. The possession of goods recently stolen is evidence of larceny only. The charge was, that they had been stolen within sixty days. The charge, too, tended to mislead, because no goods were found in the possession of Ireland, and it therefore had no application to the case. The second charge is also erroneous. Whether the affidavit constituted a charge of larceny or not, must be determined from the affidavit itself, not from a subsequent event.

The court also erred in its refusal to give the charges requested, each of which asserted a correct legal proposition, applicable to the case.

BLOCKER, *contra:*

1. The affidavit and warrant contain all that is required to sustain both counts of the declaration. It subjects Ireland to a prosecution as receiver of stolen goods, and this, by statute, is punishable as grand larceny. Clay's Dig., 425, § 60. The offence charged, that of being in possession of stolen goods,

is a felony. Ib. 439, §8. The affidavit and warrant, therefore, sustain both counts of the declaration. The testimony of the justice shows that he issued the warrant "on the affidavit, and at the instance of Field." His testimony was properly admitted. 7 Por., 437; 5 Stew. & P., 367; 21 Wend., 281; 2 Johns., 203.

A charge, falsely and maliciously preferred, which will authorize a justice to issue his warrant, and have the accused brought before him for examination in any matter that will subject him to a criminal prosecution, is sufficient to sustain this action. Long v. Rogers, 19 Ala., 328. It is not necessary that the charge should be described in technical language.

2. To constitute an arrest, no actual force is necessary, or manual touching of the body. It is sufficient, if the party be within the officer's power, and submit to him. 2 New Hamp., 318; 1 Wend., 252; 1 Bald., 239. An arrest, in a criminal case, is the detaining of the party, in order that he may be forthcoming to answer an alleged or suspected charge.

3. The charges of the court were proper and applicable, and are fully sustained by the decisions of this court. 11 Ala., 916; 12 ib., 264; 16 ib., 62; 17 ib., 540; 19 ib., 320; ib., 605.

GOLDTHWAITE, J.—If a person makes a charge against another, that he is in possession of stolen goods, we do not think it necessarily amounts to a charge of larceny, if the possessor fails satisfactorily to account for his possession. That the possession of stolen goods may, under certain circumstances, create the presumption of larceny in the possessor, is undeniable; but when, as in this case, words are used which negative the idea that any particular person was intended to be charged with the stealing, it cannot be converted into a charge of larceny by the failure of the possessor to account for his possession. The charge as given was, therefore, erroneous; and as injury may have resulted from it to the plaintiff in error, the judgment must be reversed.

As another trial may be had, it is proper to settle some other of the questions presented, with a view to the future direction of the case. Although, in our opinion, the affidavit does not amount to a charge of larceny against the defendant

in error, we regard it as equivalent to a charge of knowingly concealing stolen goods, which is felony by the Penal Code, (Clay's Dig. 425, §60,) although we would not be understood as asserting that it contains the statutory requisitions necessary to constitute the offence referred to.

The affidavit states, that certain goods have been stolen, and that they are in a trunk belonging to the defendant in error and another person. The question is, what, in common parlance, this statement amounts to. Davis v. Noak, 1 Stark. 377. No one, we apprehend, can doubt that when a party charges another with having stolen goods concealed in his trunk, it would be understood as a charge that they were concealed by such person. Such is the clear, common sense, every day meaning which would attach to the words; and we held, in Ewing v. Sanford, 19 Ala 605, that technical accuracy, in charges of this kind, was not necessary as an authority for the magistrate to act. So, in this case, that the affidavit was sufficient to authorize the magistrate to issue his warrant under the act of 1807, (Clay's Dig. 480, §24,) to arrest the defendant in error, if the goods were, on search being made, found in his trunk, we do not doubt; and we think, also, that as it amounted to a charge of felony, the justice was authorized to issue his warrant for the arrest of the defendant in error, without reference to the act last referred to.

In relation to the question presented upon the charge requested in relation to the arrest, the position cannot be sustained, that submission to process without compulsion does not amount to an arrest. We understand the law to be well settled, that no manual touching of the body or actual force is necessary to constitute an arrest. It is sufficient, if the party is within the power of the officer and submits. 2 N. H. 318; 1 Bald. 239; 1 Wend. 210.

For the error before referred to, the judgment must be reversed, and the cause remanded.

CALLAHAN *vs.* BOAZMAN.

1. If a debtor makes a payment to his creditor holding two several demands against him, and does not at the time of the payment direct how it shall be applied, the creditor has the legal right to appropriate it to either demand; but if he does not make the application until after suit is brought on both demands, neither party would be allowed to direct its application, but the law will appropriate it for them according to its own notions of justice.
2. When the payment is made in cotton, at a price to be ascertained at a future time, with a general direction that it should be applied to "all just demands which the creditor might hold against him," the creditor cannot make the application until the price is ascertained; and if, before that time, he brings suit against the debtor on both demands, the right of appropriation is taken away from both parties by the institution of the suit, and the law must apply the payment.
3. Where the creditor has two demands, the one a specialty debt, and the other an open account, and the debtor makes a general payment, without any direction as to its application, the creditor is not bound to apply it to the older of the two demands.
4. When the debtor makes a general payment, without declaring at the time in what manner and to what demand he wishes it applied, the creditor is not bound to notify him of the manner in which he has appropriated it, before the debtor will be deprived of his right to direct the application. The only obligation which he owes to the debtor is, to make the application in good faith, so as to extinguish *pro tanto* the demand to which it is applied.

ERROR to the Circuit of Lawrence.

Tried before the Hon. JOHN E. MOORE.

Boazman sued Callahan before a justice of the peace, on a promissory note for the payment of $\$48\frac{14}{100}$, and obtained judgment against him for $50. Callahan took the case to the County Court by *certiorari*, and on a trial there, a verdict and judgment was rendered against him. On the trial, a bill of exceptions was signed and sealed by the judge of that court, and a writ of error was sued by Callahan to the Circuit Court. In that court there was a regular assignment and joinder in error. It appears by the record, that a trial was had on the errors assigned, and the judgment of the County Court reversed, at the March term, 1851, of said court; but as the common law jurisdiction had, pending the writ of error, been taken from the County Court by act of the legislature, and all the cases in that court had been transferred by law to

the Circuit Court, the latter court did not remand the cause, but remitted it to its place on its own docket, and at the March term, 1852, tried it *de novo*, as though it had been originally taken to that court by *certiorari*.

On this trial, as appears by the bill of exceptions, the plaintiff read to the jury a promissory note made by defendant to him, on the 21st March, 1848, for the payment one day after date of the sum of $\$48\frac{14}{100}$, and there rested his case. The defendant then introduced and read to the jury the following writing: "Moulton, August 19th, 1848. This is to certify that I have this day sold to Hugh D. Boazman my present growing crop of cotton, or so much thereof as will pay all just claims or demands he may have against me, at the customary price the first day of March, 1849; the cotton to be delivered at some convenient gin in the neighborhood, that may hereafter be agreed upon. Witness my hand and seal." This paper is signed by Callagan. He further proved, that under this agreement he delivered to Boazman several thousand pounds of cotton. The plaintiff then proved, that he had a mercantile account against the defendant, falling due the first day of January, 1849, (but showing no other claim due when the contract for the purchase of the cotton was made, except the note sued on.) It was further shown that, on the 28th February, 1849, the plaintiff warranted the defendant on both the note and account, and the plaintiff had placed the cotton as a credit on the account, but had never given the defendant notice of his intention so to apply it, and that the defendant appeared before the magistrate who tried the causes, and insisted that the cotton should be placed as a credit on the note.

On this proof the defendant requested the court to charge the jury: 1st. That the defendant had the right, on the trial before the justice, to direct the value of the cotton delivered to be applied as a credit on the note; 2d. That, under the agreement by which the defendant sold the cotton to plaintiff, it was the duty of the latter to apply the proceeds to the payment of the note, and that under said agreement, he had no right to apply it to the account; 3d. That, if the jury believed from the evidence that the cotton was paid generally on defendant's indebtedness to plaintiff, and that no particular ap-

plication of it was contemplated by the parties at the time, that then the earliest items of credit must go to extinguish the earliest items of debit, and accordingly the cotton should have been applied to the payment of the note; 4th. That, although the creditor may make the application of a payment made to one of several debts, when the debtor makes payment without directing its application, yet he must notify the debtor of his election of the application before it will be complete and valid.

The court refused to give any one of the charges asked, and the defendant excepted to each refusal, and here assigns for error the refusals to charge as requested.

D. P. LEWIS, for plaintiff in error:

1. The contract shows an application of the cotton to the note. That was the only claim then due. The application need not be expressed; it may be implied from circumstances, from the contract. Pitman on Principal and Surety, 113; 1 En. Com. L. R. 201; 10 ib. 443.

2. If the creditor choose to apply money paid generally, he must communicate the application to the debtor, before it is valid. Pitman on Prin. and Surety, 112; 5 Taunton, 596; 9 En. Com. L. R. 29; 2 Vern. 606.

3. The law will apply a general payment to the oldest debt. 15 En. Com. L. R. 348; 30 ib. 283; 35 ib. 178, and cases cited.

4. The refusal of the third and fourth charges was clear error; because those propositions are the law of the case, from the previous ruling of the Circuit Court in error, as the first bill of exceptions shows.

R. O. PICKETT, *contra:*

There is no error in the record. It is insisted, that, inasmuch as Callahan failed to appropriate the payment, at or before the time when it was made, his right to control the aplication was gone. The principle is well settled and recognized everywhere, that if one debt be by bond, or covenant under seal, and the other by simple contract, or open account, the creditor may apply the payment to the latter. Or, if one debt be by judgment, and the other by simple contract, the creditor may apply to the latter. In like manner, if there

are several notes, due at different times, the creditor may apply the payment to whichever one he pleases; or, if the debts are distinct, he may apply as he pleases. And further, if one debt be barred by the statute of limitations, the creditor may apply a general payment to that debt, and sue upon the debt not barred. 2 Hay. 385; 4 Gill. & J. 361; 5 Taunton. 596; Richardson v. Washington Bank, 3 Metcalf 536; 20 Pick. 339; 1 ib. 332; 1 McCord 368; 8 Car. & P. 704; 5 Bingham. N. C. 455; 5 Mees. & W. 300; 2 Adol. & E. 41; 2 New Ham. 193; Overton, 488; 1 Scammon 196; 1 J. J. M. 583; 2 Vermont 283; 14 ib. 83; 13 Conn. 453.

LIGON, J.—1. The first charge asked by the defendant in the court below was correctly refused, since it appears by the proof that he had made the payment with no other direction for its application, either when the contract for the sale of the cotton was made, or when the cotton was delivered, than that it should be applied to "all just demands which Boazman might hold against him;" and as there were two, and the justice of neither is at all questioned by Callahan, Boazman had the legal right to appropriate the payment to either, if the payment were really made before suit brought. If the payment had not been applied until suit brought, and no directions had been given by Callahan until after that time, neither party would be allowed to direct its application, but the law will appropriate it, and such an appropriation will be made of it as justice requires. To this point, the case of the United States v. Kirkpatrick, 9 Wheat. 720, is a direct authority. In that case, Mr. Justice Story, who delivered the opinion of the court, says: "The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments: if he omit it, the creditor may make it; if both omit it, the law will apply the payment according to its own notions of justice. It is certainly too late for either party to claim the right to make an appropriation, after the controversy has arisen, and *a fortiori* at the time of the trial." See also, Mills v. Fowlkes, 35 Eng. Com. Law Rep. 179, opinion of Bosanquet, J.

2. There is nothing in the terms of the agreement, to take this case out of the general rule in all cases of payments

made by a debtor to a creditor who holds two demands against him, without directions for their application. Callahan agrees to sell his cotton to Boazman, and the proceeds, by the agreement of sale, are to be applied to the payment of all demands justly due from him to Boazman; but by the terms of the agreement, a future day, and that beyond the maturity of the account, is fixed to ascertain the amount of the proceeds of the cotton. The payment, therefore, cannot be considered as made until the cotton was delivered, and the price to be paid for it ascertained; for, until that time, the precise amount which should be passed to the credit of the debtor, was unknown to both parties.

The bill of exceptions does not show, at what precise point of time the credit for the value of the cotton was entered on the account, nor does it show that Callahan ever varied his agreement as to the time when such value was to be fixed. By that agreement, he evidently contracted for the advantage of the market for cotton on the 1st day of March, 1849, and before this time Boazman, for the reasons before stated, could not have made the application.

It is shown by the record, that Boazman sued Callahan both on the note and the account, on the 28th of February, 1849, the day before the credit could have been applied according to the terms of the agreement. Under the cases before cited, the right of appropriation was taken away from both parties, by the institution of the suits, before the sum to be credited could be ascertained; so the law must apply the payment.

The court could apply the credit to either of the demands, as to it might appear just and proper under all the circumstances of the cases, and since the justice of the peace has applied it to the account, and, we presume, has rendered judgment in that suit accordingly, it would be manifestly unjust to apply it again to the note on which this suit is brought, and thus enable the plaintiff in error to take a double benefit from the payment. The application of the payment by the creditor, if afterwards sanctioned by the court, in cases like the present, in which both parties have lost the right to appropriate it, in consequence of suit being brought before either had exercised it, must be regarded as the act of the court under the authority conferred on it by law.

As these views of the agreement, and of the rights of the parties, are inconsistent with the second charge asked, we are of opinion that the court did not err in refusing it.

3. We have been unable to find any case in which it has been held, that, where a creditor has two demands, the one a specialty debt, and the other an open account, and the debtor pays generally, without directions as to the application of payment, that the creditor is bound to apply the payment to the older of the two demands. Such a rule has been frequently applied by the courts, in cases in which an action is brought on an account consisting of several items falling due at different times, and, for the benefit of sureties, when the creditor has two demands, the one older than the other, and the sureties on the two are not the same. 1 Har. & J. 754; 4 ib. 98; 9 Wheat. 720; 10 Conn. 174; 5 Bingham 455.

But this case bears no analogy to either of those cited, or any of that class, and consequently is not subject to the rules which govern them. As the object of the third charge asked was, to subject it to those rules, there was no error in refusing it.

4. Neither in cases like the present, nor indeed in any case of direct payment made by a debtor to his creditor, without declaring at the time in what manner, and to what demand he desires to apply it, is the creditor bound to notify the debtor of the manner in which he has appropriated it, before the debtor will be deprived of his right to control its application.

The election being vested in the creditor, by the failure of the debtor to exercise it at the time of the payment, the former may exercise it at his own pleasure, and apply the payment to either demand. The only obligation he owes to the debtor in this respect is, to make the application in good faith, so as to extinguish the demand, *pro tanto*, to which it is applied.

There is no error in the record, and the judgment is affirmed.

LARKINS ET AL. *vs.* BIDDLE ET AL.

1. A court of equity will not reform an instrument which speaks the true agreement between the parties, although they may have mistaken the legal consequences of the agreement.
2. But where the instrument does not express the agreement between the parties, from the ignorance or want of skill of the draftsman, or from any other cause, equity will reform it.
3. A deed of gift drawn by the grantor himself, which, by reason of his ignorance of the law, does not express his intention, may be reformed in equity.
4. Where the general right claimed by the bill is the same as to all the defendants, an objection for multifariousness, on the ground that the defendants have distinct and separate interests, cannot be sustained.
5. A bill filed by the donee, asking the reformation of a deed of gift, which, it is alleged, was intended to secure the property thereby conveyed to her sole and separate use, free from the debts of her husband, is not multifarious, because it joins as defendants certain judgment creditors of her husband, who were about to levy their executions on the property, and her husband's administrator who was about to bring suit against her for the property.
6. An amendment to a bill can only be allowed when the bill is defective in proper parties, or in the prayer for relief, or in the omission or mistake of some fact connected with the substance of the case.
7. Where the amendment is inconsistent with the original bill, and makes a new case, a demurrer will lie to it.
8. Where a bill was filed for the reformation of a deed of gift, and the original bill alleged that it was the intention of the donor, at the time of the execution of the deed, to settle the slaves thereby conveyed *to the sole and separate use of the complainant, free from the debts of her husband;* and the amended bill alleged that it was the donor's intention, at the time of the execution of the deed, to secure said slaves *to the sole and separate use of the complainant during her life, and at her death to her children, Held:* That the amendment made a new and different case from the original bill.

ERROR to the Chancery Court of Lowndes.

Tried before the Hon. J. W. LESESNE.

The complainant, Eliza Larkins, filed her original bill to reform a deed of gift, which was executed and drawn by her father, James Maul, on the ground that it was his intention to settle certain slaves, specified in said deed, to her sole and separate use, free from the debts of her husband, which intention was not expressed in the deed, in consequence of the ignorance and want of skill in the draftsman. Certain judgment creditors of the husband of the complainant, who were

about to levy their executions on said slaves, and the administrator of the husband, who was about to commence suit for them, were made defendants; and the prayer of the bill was, for an injunction as to such creditors and the administrator, and the reformation of the deed according to the intention of the grantor. A demurrer was filed to the original bill, for want of equity and multifariousness. An amended bill was subsequently filed, which charges that, in making the deed, it was the intention of the grantor to have secured the slaves to the separate use of the said Eliza Larkins during her life, and at her death to her children, to which amended bill a demurrer was also filed. On the hearing, a decree was rendered dismissing the bill, from which the complainants prosecuted a writ of error.

GEO. W. STONE, for plaintiff in error:

1. Whenever, by mistake of the conveyancer or scrivener, any written instrument fails to speak the intention of the parties, chancery will reform it. Lavender v. Lee, 14 Ala. 693; Stone v. Hale, 17 Ala. 557; 1 Sto. Eq. Jur., § 165; 2 Roper on Husband and Wife, 92–156, and note o; Simpson v. Vaughn, 2 Atk. 31, case 21.

2. If the grantor himself draws the deed, it does not vary the case. Simpson v. Vaughn.

3. Such instrument will be reformed against the claims of creditors. Only *bona fide* purchasers can resist the reformation. Stone v. Hale, 17 Ala. 563–4; 1 Sto. Eq. Jur., § 165.

5. The declarations of Mr. Larkins, while in possession of the property, showing the nature of his possession, are competent proof. Bliss v. Winston, 1 Ala. 344; Oden v. Stubblefield, 4 Ala. 40; McBride v. Thompson, 8 Ala. 652; 10 Ala. 355.

6. On the subject of multifariousness, the court can lay down no definite rule. The unity of the purposes of the bill, and interests involved, must in general determine this question. In this case, the bill has but one purpose—the reformation of the deed; and all the defendants are interested, because they were seeking to condemn the property. Injunction against each was necessary. Kennedy's Heirs v. Kennedy's Heirs, 2 Ala. 572; McCartney v. Calhoun, 11 Ala. 110;

Brinkerhoff v. Brown, 6 Johns. Ch. 139, 157; Bank v. Walker, 7 Ala. 949–950. This case is wholly unlike those of Meacham v. Williams, 9 Ala. 842, and McIntosh v. Alexander, 16 Ala. 87. In those cases, interests wholly distinct were attempted to be united.

7. As to the amendment, it was agreed to, and stands in the same condition as if ordered by the Chancellor. In such case, the revising court will not reverse. Cumming's Heirs v. Gill's Heirs, 6 Ala. 562. Moreover, it would be error to dismiss for want of proper parties, unless the complainant, when the objection was pointed out, refused to amend. If the bill had been dismissed on this ground, this court would reverse and send it back, that proper parties might be made. *A fortiori*, it could not be error to amend in the court below. 12 Ala. 369; 16 Ala. 233; Sto. Eq. Pl., § 74.

8. The court permits amendments as to parties and the prayer of the bill, more readily than in any other respect. Sto. Eq. Pl. §§ 236, 883–4, and latter clause of 887: 1 Dan. Ch. Pr. 458. So the court is more indulgent when the rights of infants are involved.

9. It is allowable to strike out a party complainant, and make him a defendant, on giving security for costs. 1 Dan. Ch. Pr. 458. This condition is imposed, as I understand it, because the number of persons liable for costs is thereby reduced. By converting a defendant into a complainant, the number is increased, and the costs made more secure.

J. M. BOLING, for defendant in error:

The same general rule prevails in equity, as at law, that parol evidence is not admissible to contradict, qualify, extend, or vary written instruments. 2 Sto. Eq. Jur. § 1531.

Loose and general declarations of intention, by one member of a family, of holding property in trust for the other members, are not sufficient for the deduction of a trust which equity will recognize and enforce. Steere et al. v. Steere et al., 5 John. Ch. 1; Fonb. Eq. B. 2, ch. 2, § 6, note e. Such evidence is received with great caution. Id.

Where an agreement in writing is executed, it were not only against the express provisions of the statute of frauds, but also against the policy of the common law, to allow of

parol evidence, for the purpose of adding to, or varying the terms of the agreement. Fonb. Eq. B. 1. ch. 3, § 11. note o, and authorities there collected.

The general rule is, that parol evidence is admissible to explain, but not to contradict, alter, add to, or diminish a written instrument. Ib., and authorities there cited.

To the general rule, however, there are several exceptions: as where a declaration showing the design is made before the deed is executed, in cases of fraud and trusts, though no trust was declared in writing, and plain mistake in drawing the instrument. But the proof must be clear, strong and satisfactory; for the courts are deeply impressed with the danger to individuals to be apprehended from perjury, and to the community at large, by the insecurity of paper title. Id., and authorities cited: 1 Sto. Eq. Jur., § 152 to § 168. Relief will not be granted where the evidence is loose, equivocal or contradictory, or it is in its texture open to doubt, or to opposing presumption. Id., § 157.

With respect to evidence of declarations prior to the making of the deed, unless in the shape of instructions for such purpose, they are obviously entitled to less respect than declarations made at the time of, or subsequent to, the making of the deed; for whatever might be the intention at the time of the declarations, it might have been varied or been wholly abandoned, at the time of making the deed. The greatest circumspection is therefore due, in receiving evidence of declarations prior to the making of the deed, unless they were intended as directions or instructions for that purpose. Fon. Eq. B. 2, ch. 5, § 3, note l, and authorities there collected.

See Cowen & Hill's notes to Phillips' Ev., note 948, p. 1383, et seq., where the subject of reforming deeds is fully discussed, and the authorities collected.

Our court in no instance has gone to the extent desired in this case in reforming instruments. Paysant v. Ware & Barringer et al., 1 Ala. 170; O'Neal v. Teague & Teague, 8 Ala. 345; Clopton v. Martin, 11 Ala. 190; Stone, trustee, v. Hale et al., 17 Ala. 557. This court has gone as far in this respect as the adjudications authorize.

This case seeks to set aside the deed, and to enforce it when it is reformed and varied by the parol evidence. In

many cases the English Courts of Chancery have refused relief in such cases. 1 Stor. Eq. Jur., § 161, and authorities referred to. Chancellor Kent, however, holds differently. Ib.

GOLDTHWAITE, J.—The objections to the original bill, for want of equity and multifariousness, cannot prevail. The object of the bill is, the reformation of a deed of gift, drawn by the grantor himself, but which, from his ignorance of the law, was so unskillfully drawn as not to express his intention. The general rule is, that mistakes of law cannot be relieved in equity, and while the policy and correctness of the rule are conceded, there is frequently found some difficulty in its application. There can, we apprehend, be no doubt, that where the instrument speaks the true agreement between the parties, equity cannot reform it, because one or both of them may have mistaken its legal consequences. There is in such a case nothing for equity to lay hold of. The parties have made their own contract, and a court of equity cannot change it. Hunt v. Rousmariere, 1 Pet. 1. Thus, if, in an agreement for the purchase of land, it was stipulated that the vendor should make certain warranties, a mistake as to the legal consequences of such warranties would not authorize an application to a court of chancery for relief, however clearly the mistake was made out. But where the instrument does not express the agreement of the parties, from ignorance or want of skill on the part of the draftsman, or any other cause, it is competent for equity to correct the mistake. Hunt v. Rousmaniere, *supra*. Thus, if, in the case of the warranties as before stated, the deed was drawn by the one party, and accepted by the other, under the impression that the language of the instrument was sufficient to create the warranties stipulated for, when the terms used were not in law sufficient for that purpose, equity would in that case reform the deed so as to express the true agreement. Although the error occurred through a mistake or ignorance of the law, the error itself might be more properly considered as a mistake of fact. This principle applies in its full force to the case under consideration, and is sustained by the decisions of this court. Clopton v. Martin, 11 Ala. 187; Stone v. Hale, 17 Ala. 557.

The objection on the ground of multifariousness cannot be

sustained, for the reason that, although the defendants have separate and distinct rights, yet the object is the reformation of the deed, and the general right claimed by the bill is equally applicable to all the defendants, and such being the case, a demurrer will not hold. Mitford Eq. Pl. by Jeremy, 181–2, and notes a and b; Stor. Eq. Pl., § 530, et seq.

To the amended bill, however, there was good ground of demurrer. The bill, as originally filed, charged that it was the intention of James Maul, in making the conveyance which it is the object of the bill to reform, to settle the slaves specified therein, to the sole and separate use of the complainant, without being subject to any debts of her husband; and the prayer is, to reform it so as to give effect to the intention of the grantor. The amended bill charges that, at the time of the execution of the conveyance, it was the intention of James Maul, to secure the slaves mentioned therein to the sole and separate use of the complainant during her life, and at her death to her children. It is clear, that the amendment is inconsistent with, and makes a new case from the original bill; and the rule is, that amendments can only be granted, when the bill is found deficient in the proper parties, in the prayer for relief, or in the omission or mistake of some fact connected with the substance of the case. Lyon v. Tallmadge, 1 John. Ch. Rep. 184; Verplanck v. Mercantile Ins. Co., 1 Ed. 46. The amendment here makes a new case, because it sets up a different agreement from that charged in the original bill. McKinley v. Irvine, 13 Ala. 181.

The decree of the Chancellor dismissing the bill, must be reversed with costs, and a decree rendered dismissing the bill without prejudice.

EMANUEL *vs.* KETCHUM.

1. In *scire facias* at common law, the plaintiff may treat the *sci. fa.* as a writ simply, and declare upon it, or he may make it stand in the place of both writ and declaration; but in the latter case, the writ must contain the averments which are necessary to make a declaration good.

2. This rule of the common law is not at all affected by the statute of this State, respecting judgments *nisi*, and *scire facias* thereon, against a defaulting witness in a civil case.
3. A *sci. fa.* against a defaulting witness should set out the *subpœna*, either *verbatim* or substantially, and aver that it was served. It should also contain an averment showing at what day and term the witness was bound to appear, or it is fatally defective.
4. If there is no declaration, or if the declaration is fatally defective, for the want of an indispensable averment, the defendant may demur, move in arrest of judgment, or assign error.
5. A judgment by *nil dicit* cannot cure a defective declaration: it only admits that the party has been properly brought into court.
6. Where judgment by *nil dicit* is rendered on a *scire facias* against a defaulting witness, the judgment will be reversed on error assigned in the Appellate Court, if the *scire facias* is fatally defective for the want of necessary averments.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. JOHN BRAGG.

This was a *scire facias* by Ketchum against Emanuel, as a defaulting witness. The *sci. fa.* is in these words:

"The State of Alabama, Mobile County,

To any Sheriff of the said State, Greeting:

You are hereby commanded, to make known to Jonathan Emanuel, that at the Fall Term, 1848, of the Circuit Court of Mobile County, a judgment *nisi*, of which the following is a copy, was rendered against him:

"George A. Ketchum *vs.* Benj. F. Scattergood. } 21st day of Dec., A. D. 1848. This day came the parties, by their attorneys, and it appearing to the satisfaction of the court, that Jonathan Emanuel has been duly summoned by *subpœna*, as a witness on the part of the plaintiff in this case, and being this day called to come into court and give testimony, came not, but made default; it is therefore considered by the court, on motion of the plaintiff, that he forfeit his *subpœna*, and that the plaintiff have and recover from him the sum of one hundred dollars, unless he make his personal appearance at the next term of this court to be holden on the third Monday after the fourth Monday in March, 1849, and show good cause why this judgment should not be made absolute."

This writ is tested March 9, 1849, and was returned execu-

ted March 24, 1849, by the sheriff of Mobile county. The judgment final is in these words:

"George A. Ketchum *vs.* Jonathan Emanuel. } This day came the parties, by their attorneys, and the plaintiff moved the court for judgment absolute against the defendant, and it appearing to the court, that a judgment *nisi* was rendered in this court, against the defendant, in favor of the plaintiff, on the 21st December, 1848, for one hundred dollars, and that the defendant has been duly served with *scire facias*, and saying nothing in bar of the plaintiff's motion; it is considered by the court, that the said judgment *nisi* be made absolute, and that the plaintiff recover of the defendant the sum of one hundred dollars, and the costs in this behalf expended."

The errors assigned are:

1. That the record shows no *subpœna;*
2. That no *subpœna* is set forth in the *scire facias;*
3. That the *scire facias* contained no averment of the existence of a *subpœna*, nor does it contain any summons to the defendant.

JOHN A. CAMPBELL, for the plaintiff in error.

PHELAN, J.—In *scire facias* the plaintiff may treat the *sci. fa.* as a writ simply, and declare upon it, or he may make the writ stand in the place of both writ and declaration. But if this be done, the writ must contain such averments as would be necessary to make a declaration good. 2 Dunlap, Scire Facias. Such is the rule at common law, and there is nothing in our statute respecting judgments *nisi* and *scire facias* on forfeited bonds and recognizances, which at all affects the rule, in the case of *scire facias* against a defaulting witness in a civil case.

In *sci. fa.* against bail, the bail bond must be set out substantially, or in *hæc verba*, and if neither is done, it will be error; and this, too, in a case where the defendant appeared and pleaded, not noticing the defect in the *sci. fa.* by demurrer or otherwise. Toulmin v. Bennett, 3 S. & P., 220.

Upon the same principle, it is necessary that a *sci. fa.* against a defaulting witness should set out the *subpœna*, either by copy

or in substance, and aver that it was served. This is not done in the present case. The writ of *sci. fa.* is nothing more than a copy of the judgment *nisi*, which recites, that it appeared to the satisfaction of the court "that J. Emanuel had been duly summoned, by *subpœna*, as a witness on the part of the plaintiff; and being this day called to come into court and give testimony, came not, but made default. It is therefore considered," &c.

The *sci. fa.* is wholly wanting in an averment showing that the witness was bound to appear at that term on that day, or when. This was a material averment, for the want of which, allowing the greatest indulgence to this proceeding, the *sci. fa.* must be pronounced defective.

If there is no declaration, or, what is the same thing, if the declaration is fatally defective for the want of an indispensable averment, the defendant may demur, move in arrest of judgment, or assign error.

When there has been a verdict upon issue joined, it has been held, that we would presume there was a declaration, and that it had been lost from the record. It has been also held, that when the judgment was by default, and there is no declaration, or one fatally defective, the court will reverse. Neither of these decisions covers precisely the present case. Here is a judgment by *nil dicit:* "came the parties, by their attorneys, and the defendant said nothing in bar of plaintiff's motion," and there is no declaration, or else a defective one, just as we may hold the *sci. fa.* to be the one thing or the other. A judgment by *nil dicit* does nothing more than admit that the party is properly brought into court. It cannot cure a defective declaration. Randolph v. Cook et al., 2 Por., 286. We are compelled to hold, that this appearance is no waiver, either of the defects of a declaration or of the want of a declaration. See 15 Ala., 841; 5 ib., 674.

The judgment below is reversed, and the cause remanded.

BOYKIN *vs.* EDWARDS.

1. A party is incompetent to execute process in his own favor.
2. But mere identity of name will not authorize the court to infer, in the absence of a direct allegation in the pleadings, that the plaintiff in the writ and the deputy constable by whom it was executed are the same person.
3. In trespass against defendant for taking plaintiff's horse, defendant pleaded justification under legal process, to which plaintiff replied specially that at the time of the levy he had a family and but the one horse levied on, which was protected by law from levy and sale. *Held,*
   That the replication admitted the validity of the writ and the capacity of the person by whom it was levied to execute it, and only raised the question whether the horse was subject to the levy; and though the proof showed that the plaintiff in the writ was the person who executed it, and the court charged the jury that the levy was valid though made by the plaintiff in the writ, yet it was error without injury, and the judgment would not be reversed.
4. The statute of this State, (Clay's Digest 210, § 47,) which exempts from levy and sale one horse for the use of every family, can be invoked only by a person who *resides in this State*, and has a family.
5. The statute of Mississippi which exempts one horse from levy and sale is a local act, and can only protect the property exempted so long as it remains within the limits of that State.

ERROR to the Circuit Court of Choctaw.
Tried before the Hon. L. GIBBONS.

This was an action of trespass, for taking the plaintiff's horse. The suit was commenced against James Whitted and Sterton B. Edwards; pleas, not guilty; and each defendant pleaded separately, justification. Edwards set out in his plea of justification, that an attachment was issued by Joshua Morse, a justice of the peace, in favor of John P. Cook and Sterton B. Edwards, against the plaintiff, Boykin, which writ came to the hands of James Whitted, a constable. The plea set forth the writ, and, on the back of it, the following endorsements: "Sterton B. Edwards is deputized to execute this writ, September 12, 1850, (signed,) Joshua Morse, J. P. [seal]." "Attached one bay horse, 16th September, 1850. S. B. Edwards, deputy constable. Attached one bay horse, September 19, 1850, James Whitted, constable." The plea then avers, that the defendant, Edwards, did not take the horse, but that the constable did, under the said writ of at-

tachment. The constable, also, justified under the attachment, and the plaintiff, dismissed his suit as to him, and demurred to the special plea of Edwards, but his demurrer was overruled.

The plaintiff then replied to the special plea of Edwards, that he had a family at the time of the levy of the attachment, and had but the one horse levied on, and having no oxen, the horse was not liable to the attachment. On this replication issue was taken, and the parties went to trial, which resulted in a verdict for the defendant. During the trial the plaintiff took a bill of exceptions, which shows, that the attachment was in fact levied by the defendant, Edwards, who was deputized by the justice to make the levy, and that he was one of the plaintiffs in the attachment suit. It further appeared, that the residence of the plaintiff was beyond the line of this State, and was in Mississippi, although the larger part of his farm was in Alabama. The plaintiff also proposed to show, that, by the laws of Mississippi, one horse was reserved for the use of a family, and was exempt from levy and sale; but the court ruled, that the statute of Mississippi could not protect the plaintiff in this State, and excluded the proof, to which the defendant excepted. The court charged the jury, in substance, that the levy of the attachment was not void because the writ of attachment was levied by Edwards, one of the plaintiffs in that suit: and further, that if the plaintiff's dwelling house was beyond the limits of this State, that then he was not entitled to the benefit of the statute of Alabama, reserving one horse for the use of a family exempt from levy and sale. To these charges the defendant excepted.

RAPIER for the plaintiff in error.

No counsel for the defendant.

DARGAN, C. J.—It is contended, that the court erred in overruling the demurrer to the plea of justification, for the reason, that the defendant, being one of the plaintiffs in the attachment, was incompetent to execute it, and the levy was therefore void.

It may be admitted that a party is incompetent to execute

process in his own favor, but still we think the demurrer was correctly overruled, for two reasons: first, there is no allegation in the pleadings showing that Sterton B. Edwards, the plaintiff in the attachment, is the same person who was deputized by the justice to execute the writ, and who made the levy. True, the name is the same, but I do not see how the law could intend that the individual who executed the writ was the same person in whose favor it issued, merely because the name is the same. I think it should have been made to appear that he was, by a direct allegation. But independent of this, the plea directly denies that the defendant took the horse, and avers that it was levied on by the constable, James Whitted. This allegation is not contradicted, but directly admitted by the demurrer, and the writ being valid on its face, as set forth in the plea, we think it clear that the demurrer was correctly overruled.

It is, however, insisted, that the question is presented by the bill of exceptions, as the evidence shows that the defendant was one of the plaintiffs in the attachment, and also, that he did in fact make the levy, and upon this evidence the court instructed the jury that the levy was not void. But here the plaintiff is met with the difficulty, that he did not, by his replication, traverse any of the facts set forth in the plea: but, on the contrary, replied that he had a family, and but one horse, which was protected from levy and sale. This replication does not put in issue the legal capacity of the defendant to execute the process, but raises the question only whether the horse was liable to the attachment. The validity of the writ, and the capacity of the party or person who executed it, are admitted, and the only issue is, whether the horse was subject to the levy. Consequently, if the court erred in charging the jury that the levy was valid, though made by the defendant, it was error without injury, and therefore will not reverse the judgment, for the court only charged what in effect was admitted by the plaintiff's replication.

It appeared that the plaintiff resided in Mississippi, just beyond the line that separates this State from that, and had the larger part of his farm in Alabama; the levy was made in this State, and the question is therefore raised, whether the

plaintiff is entitled to the protection of the act of 1833, which exempts one horse from levy and sale, for the use of every family, besides several other articles of property. See the act, Clay's Digest 210. In the case of Allen v. Manasse, et al., 4 Ala. 554, this act received a construction from which we cannot depart. It was there held, that the act was only applicable when the party invoking its protection had a family, and resided in this State, and if he did not have his residence within the State, he was not within its protection. Applying this rule of construction, it is clear that the plaintiff is not entitled to the benefit of the act, for he resided beyond the limits of Alabama. We also think, that the statute of Mississippi, which is almost identical with our own, cannot protect him. For although the horse was exempt from levy and sale in Mississippi, yet the Mississippi act is local, and can only protect the property exempted by it from execution, so long as the property remains within the limits of that State; but when it passes from beyond her jurisdiction, it then loses the protection of her statute, and the residence of the owner being in Mississippi, he cannot acquire the benefit or protection of the act of Alabama.

There is no error in the record prejudicial to the plaintiff in error, and the judgment must be affirmed.

BRYANT *vs.* YOUNG, HALL ET AL.

1. A conveyance executed by an insolvent to one of his creditors, absolute on its face, but accompanied by a contemporaneous parol agreement that it should operate only for the grantee's indemnity, is fraudulent and void as to the other creditors of the grantor, and will be set aside in equity.
2. If the land has been sold by the grantee to a *bona fide* purchaser for a valuable consideration, who is not made a party to the bill filed by the creditors of the grantor, the land itself cannot be subjected to the complainants' demand.
3. But the proceeds of the sale in the hands of the fraudulent grantee may be subjected, and so far as any portion of the same can be traced into other property purchased or exchanged by him, a court of equity will fasten a trust upon it in favor of the creditors.

4. If the creditor elects to follow the proceeds of the land in the hands of the fraudulent grantee, the purchaser from him is not a necessary party to the bill.
5. The fact that the fraudulent grantee was also a creditor of the grantor's, only proves that the transfer to him was upon a valuable consideration, but does not give him a superior equity to complainant's. Evidence of the fraudulent intent supersedes the whole inquiry into the consideration; for, no merit in any of the parties to a transaction can save it, if it carries intrinsically or extrinsically the evidence of fraud.

ERROR to the Chancery Court of Benton.

Heard before the Hon. D. G. LIGON.

This bill was filed by Rowland Bryant, the plaintiff in error, against William Young, Fleming Young and Thomas Hall. Its object is, a discovery of effects, and to subject to the satisfaction of complainant's judgment at law against William Young, certain real and personal property alleged to have been fraudulently conveyed by him to the other defendants, for the purpose of hindering, delaying and defrauding his creditors. The complainant dismissed his bill before the hearing, so far as it sought to condemn the personal property, and prosecuted it only as to the real estate.

The bill charges, "that said William Young furnished money and entered a tract of land, at the Cross Plains in Benton county, heretofore called the "Box place," and now called the "Price place;" that the entry was made in the name of said Fleming Young, and by him held for the use of said William; that, not long since, said William managed to sell said land to one Price, for about $800; that the notes taken for said purchase money were made payable to said Thomas Hall, under the pretence that said William was indebted to him; and that said Hall and Fleming have in their possession and control other property and effects, which of right belong to said William, and which they hold for him, and allow him to use whenever he sees proper to do so."

The defendants answer separately, denying all fraud and combination. They allege, that said William Young purchased, and entered in his own name, a tract of land known as the west half of the north half of the north west quarter of fractional section eight, in fractional township thirteen, range eight, east, containing $73\frac{1}{100}$ acres; that he

afterwards exchanged a part of this land, with one John W. Ledbetter, for the north east quarter of the north west quarter of fraction E, of the same section, and took from him his bond for title in his own name; that he afterwards sold said land, together with the residue of the tract first purchased by him, to said Thomas Hall, and transferred to him Ledbetter's title bond, and also gave his own title bond for the residue; that the consideration for said transfer, sale and bond, was, that said Hall had, before that time, become security for him, on several debts, which are particularly described in the answers; "it being considered that said land was worth about the amount of said claims, and the said Hall being willing to take the same, as his indemnity, and discharge said debts, which was agreed to by said William; the said Hall saying at the time, that all he wanted was to be secured, and that if he sold the land for a larger amount than sufficient to pay the same, he would account to said William for the surplus; that said land was afterwards sold by said Hall, together with another tract then owned by him, to one James Price, for the sum of $800, by and with the consent of said William, the land which said Hall got from said William being rated at $300."

They deny, that said William furnished the money and entered the tract of land at the Cross Plains, called "the Box place;" and allege, that said entry was made by Fleming Young in his own name, and with money furnished him by said Hall; that said land was afterwards transferred to said Hall, to secure the entrance money advanced by him, and was embraced in the tract sold to said Price as aforesaid; that the contract of sale with said Price was conducted by said William Young, subject to the subsequent ratification of the contract by said Hall, who was the owner, and who subsequently ratified said contract, and received the proceeds.

The testimony taken in the cause is very voluminous, but it is not thought necessary to state it at length, as the opinion of the court proceeds mainly on the admissions contained in the answers. There was proof that one Box had a pre-emption claim to the tract of land which Fleming Young afterwards entered, and that he made an agreement with said William Young to let him have one half of the land, if he

would advance the entrance money for the whole tract; but this agreement was never carried into effect, and the land was subsequently entered by Fleming Young, as already stated.

The Chancellor dismissed the bill, holding, that the proof was not sufficient to outweigh the positive denials in the answers, and show that the defendants had been guilty of any fraud, in fact, intention or law; and his decree is now assigned for error.

JOHN FOSTER, for plaintiff in error:

The answers admit, that the conveyance from William Young to Hall, though absolute on its face, was only intended as an indemnity or security for payments made, or liabilities incurred by him for Young, and contained a parol reservation for the benefit of the grantor. Such a conveyance, absolute on its face, but intended only as a security or mortgage, is fraudulent and void against creditors and purchasers. If there are incumbrances on property, parties must frame their contracts accordingly. Holcombe v. Ray, 1 Iredell, 342; Gregory v. Perkins, 4 Dev. 50; 8 New Hamp. 290.

The courts will not give the least countenance to the securing of debts by absolute conveyances, if there is a secret understanding that the debtor is to be benefited. Smith v. Lowder, 6 New Hamp. 69.

J. B. MARTIN, *contra:*

1. This is a creditor's bill in the nature of a garnishment, seeking a discovery of effects. The answers are directly responsive to the allegations of the bill, denying all fraud, or that they have any effects belonging to Wm. Young; and not being overturned by proof, the answers must prevail. Fenno, et al. v. Sayre & Converse, 3 Ala. 478; Hogan et al. v. Smith, et al., 16 Ala. 600; Ware v. Jordan, decided at January term, 1851, but not reported.

2. The admissions or declarations of William Young, after he had made the sale, cannot affect Thomas Hall, unless he was connected with it, which is not pretended. Collier v. Chapman, 2 Stewart, 163; Julian v. Reynolds, 8 Ala. 680; 8 Porter, 270; 3 Ala. 83.

3. Whatever may have been the intentions of said William

Young as to fraud, the other defendants, not being connected with them, are not to be affected by them. 7 Ala. 142; 10 ib. 355; 7 ib. 585.

As to secret trusts, see 12 Ala. 101; 11 ib. 690; 1 ib. 259.

4. The transaction between William Young and Hall is, at most, but a mortgage or deed of trust, executed by Young to Hall, with the usual power of sale, and the usual provision, that if, upon a sale, the property should bring more than enough to pay the debt, the balance should go to the mortgagor. It has been decided, that this provision does not vitiate the transaction, as it is only expressing what law and justice do, without any express stipulation.

5. But if this conveyance is to be regarded as an assignment, then Price was a necessary party to the bill, since the land has been sold to him; and as his interest appears upon the face of the bill, the demurrer for want of proper parties should have been sustained, and the bill dismissed for that reason. 1 Dan. Chan. Prac. 619.

CHILTON, J.—This was a bill filed by Bryant, the plaintiff in error, a judgment creditor of the defendant, William Young, for the discovery of effects, and to subject certain personal and real estate specifically described, to the satisfaction of the plaintiff's judgment.

The plaintiff dismissed his bill as to the personal estate, and the Chancellor having decided against him as to the real estate, he seeks to reverse that decree in this court.

The land consists of two small tracts, one of which, called the Box place, being the east half of the south west quarter of section eight, in township thirteen and range ten, was sold by Fleming Young to Thomas Hall. As to this tract, the decree refusing relief is clearly correct. It was entered in the name of Fleming Young, with the money of Hall, to whom said Fleming afterwards transferred it in part to secure the repayment of the purchase money. The arrangement made between Wm. Young and Box, had no necessary connection with the entry of the land subsequently by Fleming; and the fact, that in the transfer of the land by Fleming to Hall, a debt of William for which Hall was bound as security, was provided for, is not sufficient to show that this land, or any in-

terest in it, belonged to William Hall. After a careful examination of the record, we are satisfied that it fully sustains the decree of the Chancellor, as to this portion of the land.

With respect, however, to the proceeds of the land transferred by William Young to Hall, we think the decree is erroneous.

It appears that William Young, being the owner of the north west quarter of the north west quarter of fraction E, section eight, township thirteen, range eight, and holding the bond of one Ledbetter for title to the north east quarter of the north west quarter of the same fraction, made an absolute transfer of Ledbetter's bond to Hall, and executed his own bond to make him title to the portion owned by him. These transfers are absolute, as indicated by the writing and assignment. But both William Young and Hall show very clearly in their answers, that, although the transfers were absolute upon their face, they were intended merely for the security of Hall: "to indemnify him against his liability for William on a note held by one Isbell, for $100, and a note due to one Dugger, for 52\frac{50}{100}$, and to secure the payment of a note due to said Hall of 81\frac{50}{100}$." It was consented and agreed between them at the time, that Hall should not speculate upon the property, but if Hall sold the land for more than would indemnify him, the overplus should be paid to said Young. There is, therefore, no doubt, if we look alone to the answers, that here was a parol trust in favor of Young, the vendor, and that the contract was designed to operate in the nature of a mortgage, as between the parties, but as to all the world beside, the sale should be absolute, as evinced by their writings. If such was not the intention, why, it may well be asked, did not the parties execute a mortgage or deed setting forth the trust? By this arrangement, Young, who is shown to be insolvent, is enabled to place his property as a kind of deposit in the hands of Hall, secured against his other creditors by an absolute sale, but, as between him and Hall, to operate merely for Hall's indemnity, after which Young is to make the most of it.

The law will not tolerate such a transaction: for if it did, an insolvent debtor could easily arrange with a favored creditor to become the absolute owner of his effects, thus securing

them, by the absolute nature of the transfer or conveyance, from liability to his other debts, while at the same time, he could avail himself of the effects as secured in trust: could speculate upon his equity of redemption, or pocket the residuum should a sale take place, or use the transfers as a cover for future advances. It requires neither argument nor illustration to show with what case such transfers could be converted to the worst of purposes.

In Gregory v. Perkins, 4 Dev. 50, it was held, that "a deed absolute on its face, but executed on a parol agreement for redemption, is, in law, fraudulent and void against the creditors of the vendor."

So, also, in the late case of Holcombe v. Ray, 1 Ired. Rep. 340, it was held, that "a deed absolute on its face, but intended as a mortgage only, is fraudulent and void against creditors and purchasers, and against subsequent as well as prior creditors." And, in the case last cited, the court went so far as to hold, that the deed was not validated by the subsequent agreement between the grantor and grantee, that the latter should have all the interest of the grantor in the premises, and the actual payment by the grantee of the full value of the land to the grantor's creditors.

The courts uniformly refuse to lend countenance to this mode of securing debts by absolute conveyances or transfers, while there is an understanding between the parties reserving an interest to the grantor. Smith v. Lowder, 6 N. H. 69; 8 ib. 290.

There is no hardship in requiring those who seek to gain a preference over other creditors of an insolvent debtor, to make the written evidence of the contract substantially conform to the truth. The propriety of such a course is obvious to every ingenuous mind. By doing so, the other less fortunate creditors of the insolvent party will not be deluded by false appearances, the registration laws will not be defeated in securing the object which led to their enactment, and the unfortunate debtor himself will be cut off from temptations to fraud and circumvention in creating secret trusts for his benefit.

Another question, however, arises in this case which is not free from difficulty. This tract of land, with others, has

been sold to one Price, and the bill does not negative the idea of his being a *bona fide* innocent purchaser for a valuable consideration. Indeed, there is no averment impeaching the sale, or seeking to set it aside, and Price is not made a party. So that it is clear, however fraudulent and void the sale from Young to Hall may have been, the land under the present bill cannot be subjected. 1 Story's Eq. § 381. The question then comes up, can the proceeds be followed and subjected?

Hall, it will be remembered, is a creditor of Young, and this land was sold to him partly to secure the payment of his own demand, and partly to provide for the payment of demands for which he was bound for others. It appears that a portion of the proceeds of the sale to Price has been received in money, and applied to the payment of these debts. It is very clear, that the court will not interfere to set aside such payment, or charge Hall with the funds thus appropriated; while, on the other hand, it is equally clear, the exchange of the land for other property or effects upon which the court may fasten a trust, and which may be identified, does not deprive the court of its power to subject the thing substituted. Otherwise, all that a fraudulent grantee would have to do in order to avoid the claims of the creditors of the grantor, would be to exchange the property for other effects. We think the property substituted, or for which the land was exchanged, if of such a nature that it can be pursued and identified, is subject to the same equities which attached to the land itself. "Courts of equity," says Judge Story, "in regard to fraud, whether it be constructive or actual, have adopted principles exceedingly broad and comprehensive, in the application of their remedial justice: and especially where there is any fraud touching property, they will interfere and administer a wholesome, and sometimes even a stern justice, in favor of innocent persons, who are sufferers by it, without any fault on their own side." 2 Story's Eq. § 1265.

And, speaking of a change of the subject matter of the trust into other property, he remarks, "it matters not in the slightest degree, into whatever other form, different from the original, the change may have been made, whether it be that of promissory notes, or of goods, or of stocks; for the pro-

duct of a substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such. The right ceases only when the means of ascertainment fail; which, of course, is the case when the subject matter is turned into money, and mixed and confounded in a general mass of property of the same description." Ib., § 1259.

Applying these principles to the case before us, we have shown, that according to the settled law, the transfer to Hall being absolute, with a reservation by parol that it should operate merely as a security, was fraudulent as against the creditors of Young. He has sold the land to Price with other land, it being estimated in the contract at, say three hundred dollars, the whole land selling for eight hundred dollars, and he received two horses rated at, say three hundred dollars, and notes for five hundred dollars. A portion of the substituted property can be identified, and we think a trust should be fastened upon it in favor of the creditor, to the extent of the actual cash value of the land sold by William Young to Hall, at the time of the sale to Price, and that the notes be collected and the property sold to raise that sum, unless Hall shall pay the same.

According to the view we have taken of the case, it was unnecessary to have made Price a party to the bill, as his title is conceded; and the creditor elects to charge the product of the sale in lieu of the land, which he well may do, even had Price not purchased in good faith. Watts v. Girdlestone, 6 Beav. R. 188; 2 Story's Jurisp. §§ 1262, 1273, 5 Edition.

It is argued, that Hall cannot be regarded as occupying towards this property a worse position than if he had taken a mortgage which he had failed to record, and that having sold the land before the plaintiff's judgment was rendered, or any lien attached, and being a *bona fide* creditor of Young, he has a superior equity to that of the plaintiff. The fact that he was a *bona fide* creditor, only proves that the transfer by Young to him was upon a valuable consideration. This is not sufficient. Since the decision in Twyne's case, it has been understood to be the settled law, "that evidence of the fraudulent intent supersedes the whole inquiry into the consideration; for no merit in any of the parties to a transaction

can save it, if it carries intrinsically or extrinsically the plain evidence of fraud." Roberts on Conveyances, marg. 548. And it may be observed, that there is no plainer evidence of fraud, than an absolute paper transfer by an insolvent, with a secret parol trust in contravention of such conveyance. In the celebrated case just cited, it was graphically said, "fraud is always apparreled and clad with a trust." Especially would this doctrine apply, when, as in this case, the vendor seems to have been almost the exclusive manager of the property; rents the land, then sells it, and is found collecting the notes and controlling the property, the proceeds of the sale. True, he says he has done all this as the agent of his vendee; but he acts for himself too, for, as we have shown, he had a beneficial interest in the land, and if by husbanding the proceeds he can satisfy Hall, and leave a surplus, that would belong to him. Irrespective of the consideration that the parties may not have conceived such arrangement to be fraudulent, the law regards it as such, and it is our duty so to pronounce it.

Let the decree be reversed, and the cause remanded.

ROBERSON'S HEIRS *vs.* ROBERSON'S EXECUTORS.

1. On the distribution of an estate in which the wife is interested, the decree for her distributive share should be in the name of husband and wife, for the use of the wife.
2. A bequest of freedom to a slave is void, in consequence of his incapacity to take under the will.
3. Slaves to whom the testator attempted to bequeath their freedom go to the residuary legatee under the will, and not to the heirs at law as property undisposed of by the will.

ERROR to the Court of Probate of St. Clair.

John Roberson made his will on the 1st day of August, 1844, and died. James Roberson and John P. Roberson were named as executors, and at the January term, 1846, of

the Orphans' Court of St. Clair, they produced and proved the will, and took out letters testamentary thereon.

By the will, specific legacies are given to his daughter, Nancy Maddin, and his grand-daughter, Catharine Allen, as well as to his sons, James, Willis, John P. and Robert F. Roberson; he then bequeaths to his wife a horse, saddle, and an annuity during her life or widowhood, of $20 per annum. The will then proceeds: "The balance of my property of every kind to be sold on a credit of twelve months, and the proceeds to be equally divided with my son James Roberson, John P. Roberson, Robert F. Roberson, William A. Coleman and P. H. Castleberry." The last clause of the will is in these words: "Lastly, and for good services and regard that I have for my four slaves, to wit: Old Peter and Chany his wife, and Little Peter and Jinny his wife, I hereby set them free at my death."

The executors procured the property not specifically bequeathed to be appraised and sold, including the four slaves to whom freedom was bequeathed by the will.

At March term, 1846, the executors returned into court the appraisement and account of sales of the estate of their testator, which was received, and ordered to be recorded.

No further order appears to have been taken in relation to the estate until the March term, 1851, when, it appears, that the executors filed their accounts and vouchers for final settlement, and the court appointed the 2d Monday in June, 1851, as the day of final settlement; and as it appeared by affidavit that some of the legatees and heirs of the estate were non-residents, the court proceeded to make the following order: "It is therefore ordered, that notice be given by publication in the Jacksonville Republican, for once a week for three consecutive weeks, at least sixty days previous to said 2d Monday in June next, that it is the intention of said executors to have their said accounts and vouchers presented to the said court for allowance, and for final settlement, at a term of said court to be held at the court house of said county, on the 2d Monday in June next, when and where all persons interested in the settlement of said estate may appear and object or except if they think proper."

It is then ordered that, a copy of the preceding order be

posted up at the court house door and three public places in the county, sixty days previous to the 2d Monday in June then next.

It was further ordered, that Wm. Riggs be appointed guardian *ad litem* for David, John R., Eliza and Drucilla Castleberry, minor children of Parmenius H. Castleberry.

At the June term, 1851, the Probate Court proceeded to settle the account, and distribute the estate among the persons, who, in its judgment, were entitled to receive it.

In the decree of distribution, the executors are directed to pay Nancy Maddin, wife of Jacob Maddin, sixty dollars, as her distributive share.

To Catharine Enlow, late Catharine Allen, wife of Asa Enlow, the sum of twenty-six dollars on account of special legacy under the will of John Roberson, deceased; and sixty dollars as her distributive share.

To Willis Roberson sixty dollars, as his distributive share.

The remainder of the sum of $\$1136\frac{36}{100}$, in the hands of the executors, is ordered to be paid to Wm. A. Coleman, Robert F. Roberson, P. H. Castleberry, Jas. Roberson and John P. Roberson, the residuary legatees named in the will of the testator, in sums of $\$184,87\frac{1}{2}$ each.

The money thus divided was derived from the sale of the property mentioned in the residuary clause of the will, and the four slaves to whom the testator bequeathed their freedom.

The final settlement and decree of distribution are assigned for error.

MORGAN & WALKER, for plaintiffs in error.

B. T. POPE, *contra.*

LIGON, J.—There are two errors manifested in this record for which the decree must be reversed.

1. The decree is in favor of Mrs. Maddin and Mrs. Enlow for their supposed portions of the estate, when it is apparent that their husbands are alive, and are named in the decree, but by its terms excluded from any interest under it. In the case of Croft v. Terrell, 15 Ala. 652, it was held, that, on the distribution of an estate in which the wife is interested, the decree for her distributive share should be in the name of the

husband and wife, for the use of the wife. Here the decree is in favor of the wife alone, without including the husband. Were this the only error, it might, perhaps, be corrected here, if the parties were entitled as distributees, but as the case must be sent back in consequence of more fatal error, I have thought it best to note this one also.

2. The money in the hands of the executors, as appears from the record, is derived from the sale of the personal estate of the testator not specifically bequeathed, and the four slaves on whom the testator attempted by his will to confer their freedom. They were rightly treated as a part of the personal estate of the testator, notwithstanding he bequeathed to them their freedom; for it is well settled in this State that a slave cannot acquire property either by descent, bequest, or purchase, so that a bequest to them of freedom is void, in consequence of their incapacity to take under the will. Trotter, Adm'r, v. Blocker and Wife, 6 Por. 269.

But the Probate Court seems to have treated these slaves, or the money arising from the sale of them, as a portion of the estate of the testator not disposed of by the will, and consequently ordered it to be distributed among the heirs at law of the testator, as in case of intestacy. In this, I think the court clearly erred. It is well settled that a lapsed or void legacy of personal property, goes to the residuary legatee. 1 Jar. on Wills, 302; Taylor v. Lucas, 4 Hawkes 215; James v. James, 4 Paige 115; Gore v. Stevens, 1 Dana 206; Van Kleeck v. Ref. Dutch Church, 6 Paige 600; Hayden v. Stoughton, 5 Pick. 528–537–538. As, then, these slaves were the property of the testator at the time of his death, and are not otherwise disposed of by his will, they pass to James, John P. and Robert F. Roberson, William A. Coleman and P. H. Castleberry, under that clause in which the testator bequeaths to them, "the balance of my (his) property of every kind," or the proceeds thereof when sold.

Neither Mrs. Madden, Mrs. Enlow, nor Willis Roberson, is entitled to any part of it as heirs at law of the testator. If the legacies bequeathed to them have not been paid by the executors, they have their remedy against them as legatees, but no claim whatever as distributees of the estate of John Roberson, deceased.

It is needless to examine the other errors insisted on in the brief of the plaintiff in error. For those already noted the decree must be reversed, and the cause remanded.

BILBERRY'S ADM'R *vs.* MOBLEY, USE, &c.

1. Where evidence is *prima facie* irrelevant, it is the duty of the party offering it to show its relevancy, by connecting it with other facts which are proved, or by offering it in connection with facts expected to be proved.
2. It is the duty of the court, to decide the question of the admissibility of evidence at the time it is offered, if objection is then made to it; and although the subsequent proof of facts, upon which its admissibility depended, might cure the error, yet, where such facts do not appear affirmatively from the record, the decision of the court, in admitting the evidence, is not divested of error by instructing the jury that they must disregard it, unless there is other evidence to connect with it and make it admissible.
3. On a trial of the right of property, between the plaintiff in execution and one claiming under a purchase from the defendant, the declaration of the defendant, that the sale was fraudulent, made when he was not in possession of the property, and when the claimant was not present, is *prima facie* inadmissible against the claimant, in the absence of proof connecting him with the fraud.

ERROR to the Circuit Court of Dallas.

Tried before the Hon. E. PICKENS.

This was a trial of the right of property to certain cotton, on which an execution had been levied in favor of the defendant in error against Isam Bilberry, and which was claimed by Henry Bilberry, the intestate of the plaintiff in error. The bill of exceptions recites, that "the plaintiff in execution made out a *prima facie* case, and the claimant defended, and made the issue doubtful by the proof; whereupon, the plaintiff introduced a witness to prove, against said Isam Bilberry, that, after the sale of said Isam Bilberry's interest in the cotton to the said Henry Bilberry, and when said Isam was not in possession of said cotton, witness heard him say that said sale to Henry Bilberry was fraudulent. This declaration was made when said Henry was not present.

The claimant objected to the introduction of this evidence,

but the court admitted it, "as tending to show fraud on the part of said Isam Bilberry only," to which the claimant excepted. The court instructed the jury, that this evidence, "as affecting Henry Bilberry, was to be disregarded, unless he was by other proof connected with the fraud."

The admission of the evidence is now assigned for error.

WATTS, JUDGE & JACKSON, and GAYLE & GAYLE, for plaintiff in error:

1. Isam Bilberry was defendant in execution, and if present, could not have been examined as a witness. See Acts of 1845, p. 136, § 2. If the defendant in execution could not testify, his declarations are inadmissible. It would be an anomaly to exclude a man, (if present,) and admit his declarations, (when absent.)

2. Independent of the statute, his declarations were inadmissible, because he was not in possession of the property when they were made, and Henry Bilberry was not present. See Mobley, use, &c., v. Bilberry, 17 Ala., 428, § 1; McBride and Wife v. Thompson, 8 Ala., 650; and case cited in 17 Ala., 428, *supra*.

3. The instruction of the court to the jury does not cure the error, or relieve the claimant from injury. It was erroneous, too, because the declarations of Isam, under no circumstances, could be admitted to involve any but himself. If he had said, under a different state of facts, that he intended to commit a fraud, such declaration might have been admissible; but the declaration allowed to go to the jury embraces and involves the claimant in the fraud. The declaration was, "the sale was fraudulent between him and Henry," and implies that Henry participated in it; and that implication was a part of the declaration. Isam was not a party to the suit.

4. The admission of Isam's declarations, and their remaining with the jury, decided the case for the plaintiff. It produced an impression with the jury which no instructions of the court could remove. They should have been excluded, when it was shown that Henry was not present, and Isam not in possession of the cotton. See McCurry v. Hooper, 12 Ala., 823.

5. The declarations of one not in possession are inadmissi-

ble to defeat a title from himself. See Mobley v. Bilberry, 17 Ala., 428, § 1.

A. P. BAGBY, *contra.*

GOLDTHWAITE, J.—The rule has been repeatedly recognized by this court, that, where evidence is *prima facie* irrelevant, the person offering the testimony must show how it could be made relevant, by connecting it with other facts which are proved, or by offering it in connection with other facts expected to be proved. Abney v. Kingsland, 10 Ala., 355, and cases there cited. The evidence set out in the bill of exceptions was *prima facie* irrelevant against the defendant below, unless proof had been made tending to connect the intestate, Henry Bilberry, with the fraud, or unless it was offered in connection with evidence which would have that tendency. Abney v. Kingsland, *supra.*

The question as to the admissibility of evidence is for the court to decide, and, when called upon, it should apply the test at the time at which it is offered, although the subsequent proof of facts, upon which its admissibility depended, might cure the error; but where such facts do not appear affirmatively from the record, the instructions given to the jury, "to disregard such proof, in the absence of other testimony tending to connect the intestate with the fraud," cannot, of itself, divest the decision of the court of error in admitting the evidence. The case of Abney v. Kingsland, *supra*, is clear upon this point; and see also Jones v. Norris, 2 Ala., 526.

In consequence of the error of the court in admitting this evidence, the judgment is reversed, and the cause remanded.

PAULDING *vs.* WATSON AND EIDSON.

1. An answer which denies the allegations of the bill upon information merely, and calls for proof of them, does not require the proof of two witnesses, or of one witness with corroborating circumstances, to overcome the force of its denial.

2. A bill was filed to enjoin a judgment at law, founded on a note alleged to have been given for a gaming consideration; and the defendant, who was an assignee of the note, denied the alleged gaming consideration, upon information merely, and called for proof. The note, which was for $1030, was dated Sept. 17, 1836, and payable January 1, 1837; and the bill was filed in 1845. The only witness examined as to the consideration, testified, that, in the spring of 1836, he was present at a certain place while the maker and payee of the note were playing at cards, and that the maker then gave to the payee, on account of his losses at cards, his promissory note "for one thousand dollars, perhaps a few dollars more;" that the note was dated at the time of the transaction, but witness did not recollect when it was payable. The witness also testified, that the payee of the note was a gambler and a horse-racer. *Held:*
That, in the absence of all proof showing other transactions between the maker and payee in which the former gave his note to the latter, the testimony of this witness was, of itself, sufficient to outweigh the formal denial of the answer, and establish the identity of the note which he saw executed with that on which the judgment was founded.
3. The right to enjoin, by bill in equity, a judgment at law founded on a note given for a gaming consideration, is not limited by the analogy between such a bill and a bill of review, to three years from the date of the judgment.
4. Where a bill is filed to enjoin a judgment at law, and no release of errors is filed, the Chancellor can do no more than dissolve the injunction on that account; he cannot dismiss the bill for that reason.
5. Where defendant suffered judgment by default to be rendered against him, on a note founded on a gaming consideration, and, after the lapse of more than seven years, filed a bill in equity to enjoin it, and showed no excuse for his neglect or delay, he was taxed with the costs, both of the Court of Chancery and the Appellate Court, and the judgment was perpetually enjoined.

ERROR to the Chancery Court of Greene.
Heard before Hon. W. W. MASON.

This bill was filed by Paulding, against Watson and Eidson, to enjoin a judgment at law recovered by them against the complainant, on a note which he alleges was founded on a gaming consideration. The bill was filed in June, 1845, and the note on which the judgment was founded, was for $1030, dated September 17, 1836, payable January 1, 1837, to said Eidson, or bearer, and by him transferred to said Watson. The judgment was rendered by default, in March, 1838.

A decree *pro confesso* was taken against Eidson. Watson answered the bill, admitting that he purchased said note from Eidson, but denying that he had any knowledge of said note having been given by Paulding on a gaming consideration, if the fact were so; he does not profess to have any personal

knowledge on that subject, but, upon information and belief, denies that allegation of the bill to be true, and calls for proof.

The only witness who testifies as to the making and consideration of the note, is Thomas H. Nelms. He testifies, that he has known Paulding since 1835, and Eidson since 1833; that Eidson was a gambler and a horse-racer; that sometime in the spring, he thinks, of 1836, he was in company with Eidson, at Greensboro', Ala., at the time of the races; that Paulding and Eidson were engaged there at that time in playing cards; that said Paulding was the loser, and gave to Eidson, on account of his losses at cards, his promissory note "for one thousand dollars, perhaps a few dollars more;" that he saw the note, and Eidson afterwards told him that he had won one thousand dollars from Paulding, and had his note for it; that the note was dated at the time of the transaction, but he does not recollect when it fell due; that he does not know to whom Eidson sold the note, nor for what amount, except from what Eidson told him; that soon after Eidson obtained said note from Paulding, witness saw him with a sum of money a little over one half the amount of the note.

In December, 1846, a motion was made before the Chancellor, to dissolve the injunction, on the ground that no release of errors had been filed; but the motion was refused, upon its being shown that the release had been filed, through mistake, among the papers of the cause in the Chancery Court, instead of the Circuit Court; and leave was granted to the complainant to file it in the Circuit Court, which was subsequently done.

The Chancellor dismissed the bill for want of sufficient proof, and dissolved the injunction, giving judgment for costs against the complainant and his securities. This decree is now assigned for error.

JOHN, for plaintiff in error:

1. The testimony of one witness was sufficient to sustain the bill against such denial as in this answer; the defendant stating in his answer that he has no knowledge of the facts charged. Newman v. James & Newman, 12 Ala. 29, 35; Manning v. Manning et al., 8 Ala. 138.

2. The bill describes a note, its transfer and judgment thereon. The answer admits the note, the transfer and judgment as described in the bill, and simply calls for proof of the consideration of the note described in the bill and answer. It is nowhere intimated that there was any other note or any other playing. The witness proves the playing, as laid, at the place, but states from recollection, after a lapse of many years, a date different from the true date of the note described in the bill and answer. But it is clear from the circumstances stated, the amount of the note, the gaming, &c., that he is speaking of this identical note described in the bill. It would be unreasonable to expect him to recollect the precise date, nor is it necessary.

3. If Watson intended to insist that there was any other note of the same kind, or between the same parties, he should have stated it in his answer, or shown it by proof. Watson never purchased any but the one described, and it is clear from the testimony that the note the witness spoke of, was the note that Watson purchased. The complainants had nothing to prove but the consideration. Every other material allegation was admitted by the answer. The witness fully establishes the gaming consideration of the same note given by Paulding to Eidson, which was transferred to some one, for about the sum stated in the bill and answer, and proves that he saw Eidson have the note several times, and then saw him have about the sum of money that Watson says he gave for the note. Can there be any doubt that the note described in the bill, answer, and the deposition of the witness, is the same instrument, and no other or different. To draw a different conclusion, would be to found presumptions on nothing; to do violence to all the rules of evidence in regard to presumptions from facts proven.

4. There can be no doubt that the proof makes at least a *prima facie* case, and therefore the decree should have been for the complainant, unless the defendant had by some proof rebutted the *prima facie* case made by the complainant. Watson might by his cross interogatories have made the testimony more certain; but failing to do so, or take any testimony, he cannot take any advantage of the indefiniteness of the answers.

5. The fact that no release of errors was filed till after the injunction issued, cannot effect the dismissal of the bill on final hearing. The injunction might have been dissolved because no release of errors had been filed. But the bill itself could not be dismissed for this reason. If it could, no motion was made to dismiss in the court below. Therefore this irregularity was waived, and cannot now be raised for the first time.

The statute declares this judgment at law absolutely void, if founded on a gaming consideration. The dissolution of the injunction, if it had been granted, would not have dismissed the bill. Administrators of Reynolds v. Pharr & Beck, 9 Ala. 560.

WATTS, JUDGE & JACKSON, for defendants in error:

1. The statute is imperative, that no judgment at law shall be enjoined, unless the defendant in the judgment shall first sign and seal a release of errors in such judgment, and file the same in the office of the clerk of the court in which such judgment shall have been obtained. See Clay's Dig. 357, §76. And a motion was made to dissolve the injunction on this ground in the court below.

2. The proof does not support the allegations of the bill. The bill charges, that the note sued on was for a gaming consideration, and alleges the time and circumstances of making it. This is denied by the answer. The only proof introduced is the deposition of Nelms; and his testimony shows that Paulding and Eidson played cards together in the spring of 1836. He heard Eidson say that he had won about a thousand dollars from Paulding, and that he had got his note; and that he heard Eidson say that he had sold the note. Now this last declaration would be no evidence against Watson, if it was proven that this was the same note. And, indeed, none of the declarations of Eidson can be received or weighed as evidence against Watson, until the identity of the note is established. Then, his declarations before he traded the note might be evidence. But the testimony, even taking the declarations of Eidson as evidence against Watson, describes a different note from that sued on. The date is not the same as that described; the time of playing is different, and the

amount of the note is not described. The note sued on is dated the 17th day of Sept., 1836, due 1st of Jan., 1837.

3. The conduct of Paulding in neglecting to avail himself of his legal defence, and waiting so many years after the rendition of the judgment before he proceeds to enjoin, are very persuasive evidence to show that the note sued on is not the one which was given for the gaming consideration. At any rate, it was the duty of the complainant to establish the fact by competent and sufficient proof. He has failed to do this, and is not entitled to a decree.

The allegations of his bill and the proof do not correspond, and for this reason, if for no other, he cannot have a decree.

4. Under the statute giving the Court of Equity power to enjoin (in a gaming case) a judgment at law, the remedy cannot be considered anything more than a right to have a new trial by way of bill of review; and by analogy to bills of review strictly, the bill must be filed within three years from the time of the judgment. In this case, it was more than seven years from the time of rendering the judgment, before the filing of the bill.

PHELAN, J.—The answer of the defendant Watson denies his having any personal knowledge of the true consideration of the note in question, and amounts only to such a formal denial of the allegation of the bill upon that subject, as puts the complainant to the necessity of making ordinary proof only. It does not require the proof of two witnesses, or of one witness with corroborating circumstances, to overcome the force of such a denial in an answer as this. 12 Ala. 29; 9 Ala. 560.

The only question, then, upon which the decision of the case must rest, is, the weight to be given to the testimony of the witness, Thomas Nelms, as tending to establish the identity of the note purchased by the defendant Watson of the other defendant, Eidson, upon which suit was brought and the judgment recovered against the complainant, Paulding, which he now seeks to enjoin, upon the ground that it was given for a gaming consideration. It is a pure question as to the weight of evidence. The Chancellor was of opinion that the testimony did not satisfactorily prove the identity of the note de-

scribed by the witness, Nelms, with the note on which the judgment at law was recovered. In this we are compelled to differ from the court below. With the exception of the date of the note, or the time at which it was made, the identification in every other essential particular, is quite convincing to show that the note in question and the note which the witness saw, and which was given on a gaming consideration, are the same, especially, in the absence of all proof going to show that there were other transactions between Paulding and Eidson, in which a note was made from the former to the latter. What Eidson said after the note passed from his possession, is not noticed in coming to this conclusion.

The position assumed by the counsel for the defendant in error, that a bill in a case like the present should be likened to a bill of review, and bound by the same rules, and that therefore it should not be entertained if filed after three years after the date of the judgment sought to be enjoined, cannot be supported. The right to defend against a note given on a gaming consideration, at law, or, if the party fails or neglects to do this, to assail the judgment afterwards on that ground by bill in equity, is conferred by statute, (Clay's Dig. 350,) and it will not do to limit the extent of the latter right, by an implication depending for its force upon the supposed analogy between such a bill and a bill of review.

It appears from the record that a release of errors had been executed, and upon a motion to dissolve the injunction for want of such a release, the Chancellor allowed the release, which had been filed by mistake in the papers of the cause in Chancery, to be then withdrawn and filed in the Circuit Court. The decree of the Chancellor dismissing the bill was not put upon this ground at all, and could not be sustained if it were. Even if there had been no release filed, he could go no further than to dissolve the injunction on that account.

Under the view which we take of the proof in the cause, the decree of the Chancellor dismissing the bill must be reversed, and a decree rendered here perpetuating the injunction of the judgment at law; but in consideration of the neglect of Paulding to make his defence at law, for which no excuse has been shown, and his long delay in filing his bill, he will be taxed with the costs which have been incurred in this

proceeding, as well in this court as in the court below, and the clerk will enter judgment accordingly.

THE SCHOONER LOUISIANA *vs.* FETTYPLACE, GOODMAN & CO.

1. Justices of the peace had no admiralty jurisdiction previous to the act of 1836. (Clay's Digest, 139.)
2. The act of 1841, which was designed to remove all doubts as to the construction of the act of 1836, confers upon justices of the peace the same admiralty jurisdiction when the sum claimed is less than fifty dollars, that was given by the act of 1836 to the Circuit and County Courts when the sum claimed was over fifty dollars; and that jurisdiction is confined to demands which arise from "furnishing materials, labor or stores, for the use of any steamboat or other water-craft."
3. Debts or demands for dockage must be collected by common law process against the debtor, and not by admiralty process against the *rem*, unless such debts can be enforced against the vessels in the Admiralty Courts of the United States.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

STEWART, for plaintiff in error.

HAMILTON, *contra.*

DARGAN, C. J.—This was a libel against the schooner Louisiana, commenced before a justice of the peace, to recover the sum of forty dollars for dockage. The justice gave judgment for the libellants, from which an appeal was taken to the City Court of Mobile. The claimants there tendered a plea to the jurisdiction, but it was rejected on the ground that it came in too late. They then moved to dismiss the libel, on the ground that the court could not take jurisdiction of the cause in the manner in which it was brought before the court, but their motion was overruled, and the court proceeded to render a final decree upon the libel against the schooner; and the cause is brought before us by writ of error.

As the courts of this State have no admiralty jurisdiction,

save such as is given them by our statutes, we must look into them for a warrant to sustain the judgment that was rendered. The first statute on the subject was passed in the year 1823. That act makes all vessels built, repaired, fitted out or furnished within this State, liable for all debts contracted by reason of any work done, materials or supplies furnished by any merchant, trader, ship builder, mechanic or workman, upon or concerning the building, repairing or supplying such vessel, and gives jurisdiction to the Circuit and County Courts to enforce such debts against the vessel by way of admiralty process. Clay's Digest, 539. The next act was passed in the year 1836, which provides, that any person who shall furnish materials, labor, or stores, for the use of any steamboat, or other water-craft within the State of Alabama, on the order, or by the direction of the master, or clerk of the same, shall have a lien on such boat, for the amount of such materials, labor or stores; and also provides, that such liens may be enforced by way of admiralty process, before any court having jurisdiction of the amount thereof. Clay's Digest, 139.

Doubts, however, sprang up, whether this act extended to justices of the peace, and those doubts induced the Legislature, in 1841, to pass another act, by which it is declared, that the said act (the act of 1836) "is applicable to justices of the peace," and that justices of the peace are thereby clothed with jurisdiction in cases of libel to the amount of fifty dollars, under the usages and customs regulating proceedings by libel in courts of admiralty.

That justices of the peace had no admiralty jurisdiction previous to the act of 1836, is manifest, and it being doubted whether this act extended to them, the act of 1841 was passed, the design of which was, to remove all doubts on that subject, and to confer on justices of the peace the same admiralty jurisdiction when the sum claimed was under fifty dollars, that was given by the act of 1836 to the Circuit and County Courts when the sum claimed was over fifty dollars. It was not the intention of the Legislature, to give to our justices of the peace admiralty jurisdiction in all description of cases, but in those only, over which our Circuit and County Courts had jurisdiction under the act of 1836. We must,

therefore, look to the act of 1836, to ascertain the extent of the admiralty jurisdiction of a justice of the peace. But looking to that act, we find that the only demands mentioned in it are such as arise from furnishing materials, labor or stores; nothing whatever is said respecting demands or debts for dockage. Consequently, all debts for dockage must be collected by common law process against the debtor, and not by admiralty process against the *rem*, unless indeed such debts can be enforced against the vessels in the Admiralty Courts of the United States.

If the debt does not arise from furnishing materials, labor or stores, a justice of the peace has no authority to proceed by way of admiralty process to collect it; and as the demand in this case did not arise in either of these modes, the justice of the peace had no jurisdiction, and, therefore, the City Court had none, and should have repudiated the cause upon the motion to dismiss for want of jurisdiction.

Let the decree be reversed.

O'NEAL ET AL. *vs.* WILSON.

1. When an execution is levied on a slave which is under mortgage or deed of trust executed by the defendant in execution, the sheriff has no authority to sell a greater interest than the defendant in execution has, viz: the right of possession until the law day of the mortgage or deed of trust, and the equity of redemption.
2. The execution creditor has the right, under the statute, to pay off the debts secured by the deed of trust, and to be substituted to the rights of the beneficiaries; and in such case the trustee would be compelled to execute the trust for him in the same manner. But if the sheriff assumes the responsibility of closing the trust, by selling the entire property in the slave, and declaring that the proceeds of sale will be applied first to the payment of the debts secured by the deed, and the surplus to the satisfaction of the execution, his sale does not divest the title of the trustee, but only transfers to the purchaser the interest of the defendant in execution.
3. The doctrine of "*caveat emptor*" applies to sales under execution, where the sheriff attempts to sell a greater interest than the defendant has; and although a court of equity will sometimes interfere in peculiar cases, to prevent fraud, or relieve against mistakes, yet it will not interpose to relieve a purchaser from the consequences of his own folly or temerity, when he purchased with

knowledge that the property was under deed of trust, and after the sale had been forbidden by the trustee.

ERROR to the Chancery Court of Pickens.

Tried before the Hon. W. W. MASON.

This was a bill filed by the defendant in error, Wilson, against William H. O'Neal, Robt. I. Johnson, John M. Sprowl and Jesse W. Bryan, and charged that, on the 23d of October, 1849, Sprowl recovered a judgment against O'Neal for $160\frac{13}{100}$ and $8\frac{62}{100}$ cost, in the Circuit Court of Pickens, on which *fi. fa.* issued the 6th of November, 1849, and was, on the 2d of January, 1850, levied by Bryan, sheriff of Pickens county, on a negro girl, Matilda, and a buggy, as the property of O'Neal; that O'Neal had, before the levy, to-wit, on the 5th of April, 1849, executed a deed of trust to Johnson, trustee of said property, to secure certain debts set forth in the deed, a copy of which is exhibited; that said sheriff, on the 1st Monday in February, 1850, offered said slave, Matilda, for sale under said levy, "with a notice, declaration and understanding, that the proceeds of the said sale should be applied to the satisfaction of the said trust deed, if sufficient; and the surplus, if any, should be applied to the satisfaction of the writ of *fieri facias*;" that the trustee was present, and offered no objection to such application of the funds on the part of the sheriff; that plaintiff in execution was one of the bidders at the sale, with a knowledge of the proposed appropriation of the proceeds, and offered no objection; that being satisfied with the declarations of the sheriff, and concurrence therein by the trustee, through his attorney, and by the plaintiff in execution, and believing that the same would be duly carried out according to the true intent and understanding thereof, complainant purchased said property at said sale, bidding the sum of four hundred and five dollars, that being as much as she would have sold for under any circumstances; that after the sale O'Neal forbid the sheriff to satisfy the deed with the proceeds of the sale, and insisted that the funds arising from the sale should be applied to the satisfaction of the execution, and the residue paid to himself; that complainant, after the sale, took the slave into his possession, and hired her to one

Ward; that Johnson had brought his action for her against Ward, to the Circuit Court of Pickens, to the April term, 1850, which was still pending, and if the trustee succeeds complainant will lose the title and possession of said slave; that after suit was commenced he offered to rescind the contract, to give back the negro and receive his money, but the said O'Neal refused; that complainant moved the Circuit Court at its April term, 1850, to set aside the sale on the ground of mistake, but O'Neal objected, and the court refused to entertain the motion, holding, complainant had a remedy alone in equity.

The bill prays an injunction against Johnson's suit against Ward, against Bryant's paying the purchase money to the *fi. fa.* of Sprowl, and prays that the sale be set aside, and the purchase money be refunded.

O'Neal answers, and denies that complainant purchased under any sale made by either his or the trustee's acquiescence; on the contrary, he says the attorney for the trustee read the trust deed and forbid the sale.

Johnson, in like manner, denies that any consent was given by himself in any way to the sale by the sheriff, or to the application of the proceeds of the sale, as stated in the bill.

A decree *pro confesso* was taken as to the other defendants.

James B. Sherrod, a witness examined by the plaintiff below, states, that he was present at the sheriff's sale; that the sheriff then made proclamation that the slave would be sold under the execution, but that the proceeds would be first applied to the payment of debts secured by the trust deed, and the surplus, if any, would be applied to the execution. He was near the sheriff, and heard no objection to such proposed disposition of the proceeds. That Matthew Lyon was present, and represented himself as the agent of Johnson, the trustee, and forbade the sale; but don't remember his precise words.

William G. Mustin, witness for the defend ant, says, he was present and heard the same declaration by the sheriff deposed to by Sherrod; heard Lyon read something to the crowd, but does not remember what it was; heard the sheriff say said slave was under a deed of trust, but does not remember the parties; does not recollect whether Lyon forbid the sale or not; says the slave was worth, when sold by the sheriff, three

hundred dollars, and that her hire from the 15th of January, 1850, to the 15th of July, 1851, was worth sixty dollars.

Doctor Wilkins, examined by defendant, testifies that the slave had a disease which lessened her value 15 per cent.

Noel J. Smith states, the slave, at the time of the sheriff's sale, was worth $550, and her hire he estimates at $8 per month; heard O'Neal tell the sheriff the day before he levied that the property was subject to a deed of trust, and that if he seized it he would be sued.

W. C. Ferguson owned the slave, and sold her to O'Neal; thinks her worth $600 at the time of the sheriff's sale, and her hire for sixteen months worth $125.

Matthew Lyon testifies, that he was present at the sale of the slave by the sheriff, and at the instance of Johnson, the trustee, forbid the sale positively, and read the trust deed to the crowd assembled to bid, and that he did not acquiesce in the declaration made by the sheriff as to what would be done with the money; that O'Neal proposed to complainant, through this witness, if he would place him, O'Neal, in *statu quo* as to the slave and a buggy levied on at the same, and which the witnesses prove was damaged before the sale, while in the sheriff's custody, he would amicably arrange the matter; that he did not object to the sheriff's declaration as to how he would apply the money, further than to forbid the sale.

It was admitted, the Chancellor says in his decree, by the parties, that at the Spring term of the Pickens Circuit Court the complainant in the bill obtained an order setting aside the sale of the slave. The Chancellor decreed, that the action of detinue brought by the trustee, Johnson, against Ward for the slave, be perpetually enjoined; that Bryan, the sheriff, refund to the complainant the purchase money; that the slave be delivered up to the trustee without prejudice to his right to recover hire, and that the defendant, O'Neal, pay the cost of the suit.

To reverse this decree, the defendants bring the case to this court, and assign several errors in it.

Bliss & Baldwin, for plaintiffs in error:

The bill is without equity. The Circuit Court had power

to do full justice in the premises. Mobile Cotton Press v. Moore & McGee, 9 Porter, 679.

The decree is clearly erroneous, in perpetuating the injunction against the suit at law. At the time of the filing of the bill, O'Neal had a right to bring his action, or Johnson had.

It cannot be contended, that either Johnson or his attorney had a right to permit the sheriff to sell the negro, without the consent of O'Neal. Certainly, the silence of the attorney, after he had forbidden the sale, did not give that right; nor could the attorney have given such assent, even if authorized by the trustee, who swears that he did not authorize him. Sugden on Powers, 4 Ed., 177.

If, however, this silence was sufficient authority to the sheriff to sell, there was no necessity for this bill: the complainant could have defended at law.

If the sale was not sufficient to pass the title, but was unauthorized, then it was erroneous to perpetuate the injunction, even if the sale ought to be set aside. We were entitled to the negro, and in the form in which we sought to recover it. Besides, we were also entitled to the hire, and to the costs at law. We are enjoined from proceeding at law, and yet without prejudice to our recovery of hire. How are we to get the hire? Ward, the defendant, has left the country; so that we cannot get judgment at all, unless in this suit. The admission of the right to hire, is an admission of the right to sue for it.

The contract being rescinded, each party should be placed in *statu quo;* the complainant should have been decreed to pay hire, or, at least, we should have had liberty to prosecute the suit for that purpose.

The defendant being himself in fault, and the sheriff being the party who did the illegal act, and O'Nneal having committed no fault whatever, the costs should have been decreed against the sheriff or the complainant.

The defendant, Ward, should have been made a party to the bill. The decree concludes us as to him, but does not bind him.

The complainant purchased the negro, with full knowledge of every fact which could apprize him of the nature, and cha-

acter of the title that he was buying. It must be supposed, that he only bought what the sheriff had the legal right to sell, viz: the equity of redemption.

E. W. PECK, *contra:*

1. The bill in this case is not without equity; although courts of law may grant relief, by setting aside sales made under process issued by them, yet this does not interfere with the jurisdiction of the Chancellor, that he has, in such cases, independent of the courts of common law. In many cases the Chancellor only can give full relief; and such is this case. Here the court at law could only set aside the sale, but could not enjoin the suit by the trustee, or settle the other equities that had arisen between the parties.

2. There is no substantial objection to the decree. The Chancellor might, perhaps, have permitted the suit by the trustee to go on, to recover damages for the services of the slave only. This, however, he was not bound to do, because, under the circumstances, there was a violation of equity in commencing the suit, and he might well enjoin it altogether, saving to the trustee the right to recover the value of the services of the slave, in an action for that purpose only, in the event the complainant should refuse to pay for them.

3. The fourth assignment cannot be sustained, first, because it is not sustained by the record; and secondly, because no objection, for want of parties, was made in the court below.

4. The fifth assignment stands upon no better ground. By filing an answer, and going to a hearing, the defendant, Oneal, waived the demurrer that he had previously filed; besides, the defendant had the benefit of the demurrer, by the motion to dismiss for want of equity, the demurrer being a mere general demurrer.

CHILTON, J.—It will be very apparent, from the facts of this case, which I have drawn out at length, that the complainant below cannot have the relief prayed by him.

In the first place, the sheriff had no authority to sell a greater interest in the slave than O'Neal had. He had the possession and the right of possession until the 1st day of March, 1850, the law day in the deed of trust. Instead, how-

ever, of selling the equity of O'Neal, he sold the entire property, declaring that he would apply the proceeds, first, to the satisfaction of the trust, and the overplus upon the execution. He had no power thus to put himself in the place of the trustee. The creditor who has execution against the mortgagor or maker of the trust deed, has the right, under the statute, to pay off the debts secured by the trust, and thus to be placed in the situation of, or substituted to the rights secured to, the beneficiaries under it. And in such event, the trustee would be compelled to execute the trust for him in the same manner, thus tacking, as it were, his execution debt to the trust deed. Baylor v. Scott, 2 Por. 315, 322. Such was not the course pursued in this case. The sheriff assumed the responsibility of closing the trust, which he had no power to do, and the sale by him passed nothing but the unexpired term in the slave to which O'Neal was entitled, together with the equity of redemption. In other words, it transferred to the purchaser, Wilson, all the interest which O'Neal had in the slave. 8 Ala. 706; 5 Por. 182; 2 Ala. 314; 18 ib. 753, 758. It is clear, then, the sale did not divest the title of Johnson, the trustee.

Again, it is clear that Wilson purchased in his own wrong, with a full knowledge of the trust, and after the sale had been forbidden by the attorney for the trustee. Having forbidden the sale, the agent of the trustee was under no obligation to make any response to the sheriff's declaration as to the manner he intended to dispose of the proceeds. He read the trust deed, and forbid the sale. If, after this, the sheriff proceeded to sell, and Wilson to purchase, the entire property, they did so at their peril, and can claim no aid from a court of equity to relieve them from the consequences of their own folly and temerity. The doctrine, *caveat emptor*, applies to such sales; and although the court will sometimes interfere in peculiar cases, to prevent fraud, or to relieve against mistakes, this is not one of those cases.

The plaintiff below entirely failed to show, that he was misled by any act of either O'Neal or Johnson, the trustee; and if the declaration of the sheriff as to his intended application of the funds misled him, this was his misfortune in not understanding the powers and duties of the sheriff, and not

the fault of O'Neal or Johnson. It is said, the common law court has set aside the sale made improperly by its officer. This, we apprehend, was done, upon the tender of the slave back, or offer to return her; and the court which cancels the sale, the money being in the hands of its executive officer, has doubtless ordered it to be refunded to the party who paid it, if it has been paid. We say, if it has been paid, for it is worthy of remark, that there is no direct allegation in the bill that it was paid, nor any proof of the fact. We can only arrive at it inferentially, from the charge, that O'Neal refused to permit the sheriff to apply it to the purposes of the trust.

The trustee, as we have shown, had a good cause of action, not only to recover the slave, but her hire from the time he became entitled to her under the trust deed. He is not in any wise estopped, by any conduct of his agent on the day of sale by the sheriff, from asserting that title, and there is no reason whatever shown for enjoining his suit, unless, indeed, the slave has been returned; and this would constitute no valid objection to its maintenance for the hire. Besides, the return is a good answer in the common law court to a judgment for the property. The suit was, therefore, improperly enjoined. Indeed, the whole case made by the record shows, that the complainant has come into court to be relieved against his own rashness, in buying an interest in property which the sheriff could not convey, and which he was positively forbidden to sell. There was no deception practiced upon him; no want of knowledge in regard to the facts; and if, reposing upon his own or the sheriff's knowledge of the law, as to the power of the latter to sell as he did, Wilson ventured to purchase, he has no standing in a court of equity, and must take the consequences. Were courts of equity open for such complaints, there would be no end of applications to set aside improvident purchases, made, it may be, to speculate upon the chances of success. We do not say that such was the fact here; for it is but charitable to suppose Wilson was ignorant of the law, and for that reason made the purchase. While, however, we may indulge this supposition, to exonerate him from any intended violation of the rights of others, the law will not indulge the presumption to afford him relief.

Let the decree be reversed, and here rendered, dismissing

the bill; and let the defendant in error be taxed with the cost of this court and the court below.

DOE EX DEM. HUGHES ET AL. *vs.* WILKINSON.

1. Where the fee of lands was in the wife by inheritance, the deed of husband and wife, acknowledged in the ordinary form, would not, previously to the passage of the act of 1848, pass the fee to the grantee; her title could only be conveyed by deed acknowledged by her on private examination.
2. Husband and wife, by deed dated May 16, 1839, conveyed lands belonging to the wife in fee simple by inheritance, and the certificate of acknowledgment appended to the deed recited, that, "on the 16th and 17th day of May 1839," they "both personally appeared," &c., and "acknowledged the above instrument to be their free act and deed." The wife also executed a conveyance, dated May 17, 1839, and written on the back of the said deed, by which she remised, released, relinquished and forever quit-claimed, to the said grantee, all right, title, interest and claim to dower, which she then had as wife of the said grantor, or might thereafter have as his widow, to the lands and premises conveyed; and at the foot of this instrument, was written the certificate of a justice of the peace, that, on said 17th May, 1839, on private examination, separate and apart from her husband, "she acknowledged that she signed, sealed, and delivered *the foregoing instrument*, as her voluntary act and deed," &c. *Held:*
   That the last certificate applied only to the conveyance immediately preceding it, and did not extend to the deed executed by husband and wife; and that, upon her death, if she survived him, or upon his death, if he survived her, the fee vested in her heirs at law, and they could immediately assert it against the tenant in possession.

ERROR to the Circuit Court of Montgomery.

Tried before the Hon. JNO. GILL SHORTER.

The plaintiffs brought ejectment against the defendant to recover possession of lot No. 5, in the city of Montgomery, claiming title as heirs at law of Mrs. Jane A. E. McBryde, deceased. The defendant set up title under a deed of bargain and sale, made by Edward A. McBryde and the said Jane A. E. Bryde, his wife, to one Homer Blackman, under whom the defendant holds the premises by purchase.

It was agreed between the parties in the court below, as appears by the bill of exceptions, that the following are the

facts concerning the title: The premises sued for and described in the deeds, hereafter more particularly noted, were the inheritance of Mrs. Jane A. E. McBryde, in whom was the fee, at the time the deeds were signed and executed. These deeds were made while she was the wife of Edward A. McBryde, and after she was twenty-one years of age.

The first deed alluded to, is an ordinary deed of bargain and sale, for the consideration of one thousand dollars, from Edward A. McBryde, and Jane A. E., his wife, to Homer Blackman for the premises in dispute, bearing date the 16th day of May, 1839. This deed is subscribed and sealed by both the grantors named in it, and has the following certificate attached to it:

"The State of Alabama, } ss.
Montgomery County. }

I, Robert Parker, a justice of the peace, and notary public in and for said county, duly commissioned and sworn, do hereby certify, that, on the 16th and 17th days of May, 1839, the above named Edward A. McBryde, and Jane Ann Elizabeth McBryde, wife of Edward Augustus McBride, both personally appeared before me and acknowledged the above instrument to be their own free act and deed.

Given under my hand the day and year above written.

ROBERT PARKER, J. P. & N. P."

On the back of this deed is the following instrument, made by Mrs. McBryde alone:

"Know all men by these presents, that I, Jane A. E. McBryde, wife of Edward Augustus McBryde, the grantor within named, for, and in consideration of the sum of one dollar, to me in hand paid, the receipt whereof I do hereby acknowledge, do hereby remise, release, relinquish and forever quitclaim to Homer Blackman, the grantee within named, his heirs and assigns, all right, title, interest and claim to dower which I now have as the wife of the said Edward Augustus McBryde, or may hereafter have as his widow, in and to the lands and premises within described. In witness whereof, I

have hereunto set my hand and seal, this 17th day of May, 1839. JANE A. E. McBRYDE. (Seal.)

Signed, sealed and delivered, }
in the presence of }
ROBERT PARKER.

This is accompanied and followed by the following certificate, viz:

"The State of Alabama, }
Montgomery County. }

I, Robert Parker, a justice of the peace, and notary public of the county aforesaid, do hereby certify, that I have this day examined the above named Jane A. E. McBryde, wife of Edward Augustus McBryde, privately, and apart from her said husband, and that on such private examination, she acknowledged that she signed, sealed and delivered the foregoing instrument as her voluntary act and deed, freely, without any threat, fear or compulsion of her said husband.

In witness whereof I have hereunto set my hand this seventeenth day of May, 1839.

ROBERT PARKER, J. P. & N. P."

The Circuit Court was of opinion, and so instructed the jury, that on the above facts, and under the said instruments and certificates, the estate of Mrs. Jane A. E. McBryde, in the premises, passed to the grantee or purchaser. To this ruling of the court the plaintiffs excepted, and it is here assigned for error.

ELMORE & YANCEY, for plaintiffs in error.

A. MARTIN, *contra.*

LIGON, J.—Where the fee of land is in the wife, she having received it by inheritance, the deed of the husband and wife, acknowledged in the ordinary form, as the first deed in this record seems to have been, would not pass it to the grantee, under the laws of this State; for, by these, as they existed at the time this deed was made, a married woman could part with her title to land in no other way than by deed acknowledged by her on private examination. Clay's Dig. 155, § 27.

It is clear, that, if the title of the defendant depends upon the first deed in the record, with the certificate of acknowledgment immediately following it, it must fail. This proposition was not controverted on the argument, but it was insisted, that the acknowledgment which follows the deed by which Mrs. McBryde conveyed her dower estate in the premises to Homer Blackman, the grantee, was intended by her, and should be held by the court, to extend to the deed made by her husband and herself, which purports to pass the fee to Blackman. This conclusion cannot be legitimately drawn from the record before us. From all that appears in it, the facts are these: On the 16th of May, 1839, E. A. McBryde, the husband, executed and acknowledged the deed to Blackman, and on the 17th of the same month, Mrs. McBryde also executed and acknowledged it. This inference is drawn from the certificate of the justice, and the date of that deed, together with the date of the relinquishment of dower and the certificate of its acknowledgment. By reference to the deed of McBryde and wife, it will be seen that it bears date May 16th, 1839; the certificate of acknowledgment is dated the 17th of that month, and recites that the deed was acknowledged by McBryde and wife on the 16th and 17th of May. On the latter day, also, Mrs. McBryde conveys her dower by deed, separate from that made by herself and husband, and, on private examination before the same justice, acknowledges its execution. The inference is, therefore, irresistible that she had no connection with the deed until that day; when, from the date of the first deed, McBryde's connection with it seems to have commenced and terminated on the 16th. On no other hypothesis can we account for the singular certificate of the justice, which recites an acknowledgment of the execution of a deed by the grantors on two separate days. The phraseology of the deed of relinquishment seems, also, to indicate, that it was written on the back of the original deed; for it designates McBryde as "the grantor within named," and is itself a separate and distinct instrument, by its terms conveying the dower interest of Mrs. McBryde, and that alone. It could not, in fact, have obtained a more distinct character, had it been engrossed on paper wholly separate from that containing the original deed.

With these facts before us, it is apparent that the certificate of the justice, which recites, that Mrs. McBryde, when examined "privately and apart from her husband, acknowledged that she signed, sealed, and delivered the foregoing instrument as her voluntary act and deed," &c., must be held to apply to the deed immediately preceding it, or the deed conveying her dower, and not to the one which was made by her husband and herself, and which purports to convey the fee.

Under this view of the case, the fee still remained in her, and on her death, if she survived her husband, or on his death, if he were the survivor, it vested in her heirs at law, who could immediately assert it against the tenant in possession.

As these conclusions are directly opposed to those attained by the court below, the judgment must be reversed, and the cause remanded.

PARSONS *vs.* THE STATE.

1. If a wound is inflicted not dangerous in itself, and the death which ensues was evidently occasioned by the grossly erroneous treatment of it, the original author will not be accountable.
2. But if the wound was mortal or dangerous, the person who inflicted it cannot shelter himself under the plea of erroneous treatment.
3. The evidence was conflicting, as to whether the deceased came to his death from the effects of a wound inflicted by the prisoner, or from the improper treatment of it by the attending physician in sewing it up. The prisoner's counsel requested the court to charge that if the wound was not mortal, and it clearly appeared that the deceased came to his death from the erroneous treatment, and not from the wound, they must acquit the prisoner. This charge the court gave, with this qualification, "that if the ill treatment relied on was the sewing up of the wound, the defendant would not be excused if otherwise guilty." *Held:*

   That the legal proposition asserted by the qualification to the charge was erroneous. (Goldthwaite, J., *dissenting.*)

ERROR to the Circuit Court of Dallas.

Tried before the Hon. E. PICKENS.

The facts sufficiently appear from the opinion of the court.

W. M. MURPHY, for the plaintiff in error.

M. A. BALDWIN, Attorney General, *contra*.

GOLDTHWAITE, J.—The prisoner was indicted for the murder of one Mayo. On the trial of the case below, the evidence was conflicting as to whether the deceased came to his death from a wound inflicted by the defendant, or from the improper treatment which was resorted to by the attending physicians, the wound not being considered a mortal one. It was what is termed a "punctured wound," and the improper treatment which was relied on was, the bringing of its edges together, and sewing it with stitches. The court, upon this evidence, was requested by the counsel for the prisoner to charge, "that if the wound was not mortal, but by ill treatment or unwholesome applications the said Mayo died, if it clearly appears that this treatment, and not the wound, was the cause of his death, the defendant should be acquitted." This charge the court gave, but with the addition, "that if the ill treatment relied upon was the sewing up of the wound with stitches or other compresses, that the defendant would not be excused if otherwise guilty," and this addition or qualification of the charge is relied upon as the ground of reversal.

We all agree that, ordinarily, if a wound is inflicted not dangerous in itself, and the death was evidently occasioned by grossly erroneous treatment, the original author will not be accountable. 1 Hale's P. C. 428; 1 East C. L. 344, § 113. And we agree, also, that if the wound was mortal or dangerous, the person who inflicted it cannot shelter himself under the plea of erroneous treatment. East C. L. 344, § 113.

The charge given by the court below asserts the general proposition, that if the wound was not mortal, and the death properly to be attributed to the treatment, the prisoner should be acquitted; but the qualification a majority of the court hold to be erroneous, for the reason that it made an improper exception to the rule stated in the charge. In other words, they understand the charge as a whole to assert the proposition, that while the prisoner might be excused by the erro-

neous treatment of the attending physicians, yet, if such treatment consisted in the sewing up of the wound, he would be held accountable; thus excluding from the operation of the rule the actual case which the evidence tended to establish. I cannot agree with this construction, and while I admit the charge is wanting in precision and fullness of expression, I think it states the law correctly.

The evidence being conflicting as to the cause of the death, and doubtful as to the character of the wound, these were matters proper for the determination of the jury; and if the death was the natural consequence of the wound, or the wound was mortal, the defendant was answerable; and, as I understand the charge, it asserted simply this proposition. The erroneous treatment which was relied on consisted in the sewing up of the wound, instead of leaving it open; and the presiding judge, after laying down the general rule, went on to inform the jury, that if the defendant relied on the particular treatment resorted to, the sewing up of the wound, it would not operate to excuse him, if, without reference to such treatment, he was guilty; or, in his own language, "if otherwise guilty." The construction placed by a majority of the court upon the qualification, gives no effect whatever to the words I have quoted, and strikes out of the charge the limitation which qualifies the entire sentence. Regarding the legal proposition asserted by the charge as correct, yet as its tendency may have been to mislead the jury, in a case of this character, I concur in the reversal on that ground.

Let the judgment be reversed, and the cause remanded; the prisoner to remain in custody until discharged by law.

WEEMS, Executor *vs.* BRYAN AND WIFE.

1. An executor is bound to include in his inventory of assets a debt due from himself to his testator.
2. Since the passage of the acts of 1848 and 1850, the husband is entitled, as income, to the money accruing during coverture from the hire of the wife's slaves and the rent of her land.

3. The husband, who is executor of his wife, may be compelled to settle his trusteeship of her separate estate in the Court of Probate; and on this settlement, he should state with that court a full account of all moneys or other property of the wife, received by him as *corpus* or *capital* of her estate, and not as *income*, and credit himself with all proper payments or disbursements, made by him in her behalf as trustee.
4. Under the act of 1850, the husband becomes tenant for the life of the wife of the rents and profits of her estate, and, like any other tenant for life, he is entitled to *emblements*, that is, the crop growing or matured, whether gathered or not, at the termination of the life estate.

APPEAL from the Court of Probate of Marengo.

The appellant, Samuel W. Weems, as executor of his wife, Penelope R., filed in the Court of Probate of Marengo his inventory of the estate of his deceased wife, containing only a list of a number of slaves. The appellees, as heirs at law and next of kin of Mrs. Weems, filed exceptions to this inventory, and made their averments, in proper form, that said executor had omitted from his inventory a large amount of property belonging to said estate, which ought to have been included therein. Among the items alleged to have been omitted, were the following:

27 Bales cotton, at 500 lbs. per bale, worth.....	$2,000 00
1,000 Bushels of corn, at 75 cts. per bushel.....	750 00
Oats and fodder.....	150 00
Notes and money received from Alex. Sledge, guardian of said Penelope R.....	1,300 00
3 Mules, ($300) one horse or mare, ($100).....	400 00
Bed and furniture ($30,) household and kitchen furniture ($50,).....	80 00
Farming utensils ($50,) cattle and hogs ($75,).....	125 00

And appellant was required to appear, and show cause why these items should not be included in his inventory. The answer of the executor, for reasons therein assigned at length, which it is unnecessary here to set out, denied any obligation to include these items in his inventory; and the parties, upon issue joined, went to trial, by consent, before the judge of probate, without the intervention of a jury.

It appears from the record, that appellant and his wife were married in March, 1849; that he received, during that year, certain property belonging to his wife, and among other

things about $1,200, in cash and notes, from said Sledge, his wife's guardian, a portion of which notes were given for the hire of his wife's slaves for the year 1849; that, in the year 1850, he cultivated a plantation belonging to his wife, and about one hundred acres of rented land, with the slaves of his wife and one of his own; that the wife died in August, 1850, at which time a part of the crop of that year had been gathered, and the remainder was afterwards gathered, with the said slaves, and was disposed of by him. All the notes aforesaid of any value had been collected.

The wife made a will, on the 25th August, in which she appointed her husband her executor, and making him sole devisee and legatee of her land and slaves. The executor objected to including in his inventory the proceeds of the crop aforesaid, and the money received as aforesaid, on the ground that he was not bound to account for the same, except as trustee, and that the Court of Probate had not jurisdiction to compel him to do this. The objection was overruled, and the Court of Probate decreed, "that the said Samuel W. file a new, full and perfect inventory of said estate, and that he exhibit therein all the property, notes, money and effects of whatsoever description, belonging to his testatrix, which came to his hands as her guardian; that he exhibit therein a full account of all the rents and profits, which have accrued on the said property since the same came to his hands, during the lifetime of said testatrix; and that he exhibit a full return of the proceeds of the crop on hand, at the time of the death of said testatrix."

From this decree the executor appealed, agreeably to the statute in such cases, and now assigns the same for error.

A. R. MANNING, for appellant:

Plaintiff in error insists, first, that, under the two acts relating to the estates of married women, approved March 1st, 1848, and 13th of February, 1850, (the latter of which is declared in its title, as enacted to "alter and amend" the former,) the annual proceeds and profits belong to him. Such is clearly the effect of the third section of the latter act, which, in express terms, relates to the property held by the wife under the former act. And it declares, what this court

had previously affirmed, that the title to such property shall vest in the husband as trustee. See 15 Ala. 497.

But the statute further says, that the husband, "so long as he may continue trustee under the provisions of this act," shall have, possess, control and manage "all such separate estate, without liability to the wife, her heirs, executors or assigns," for the rents, proceeds, or profits thereof. Now, this act was passed for the very purpose (as every intelligent person in the State knows) of preventing the ruin and distress which the former act might produce, in allowing suits to be brought, and men to be made accountable for the administrations of the trust property, (and such administrations as that of husbands and fathers would be,) many years after the trusts had been assumed. Therefore, by express language, the third section refers to property held under the former act also.

But it was argued below, that statutes are not to have a retro-active operation, unless this be clearly intended; and that the words, "so long as he may continue such trustee under the provisions of this act," make this doubtful. But this evidently means, so long as the husband shall not be removed for unworthiness from the office of trustee, under the provisions of the next section of this act. Certainly, no rule of law requires the courts of the land to defeat the obvious intention of the Legislature by a casuistry, which, if used by one gentleman in the interpretations of his contract with another, would be regarded as unmanly equivocation.

It is not necessary to inquire whether the Legislature has power to deprive the wife of the profits of her property in her lifetime; and whether, to that extent, the third section of the latter act is operative. But certainly it has the power to say to whom the property, or the rents and profits of it, which the law itself gives to her, shall go at her death. And to say that the husband shall not be accountable for the rents and profits to the wife's executor, is to say he shall have them himself. This is a power that is exercised whenever the law of descents is changed, and which was exercised in the passage of the act converting estates tail made before the enactment, into estates in fee simple. See Clay's Digest, title "Conveyances."

And the act which makes the husband in effect a tenant for life, gives him a right to the crops remaining to be gathered also.

In the second place, the plaintiff in error insists, that the Probate Court cannot require him to account and settle his trust-administration of his wife's separate property in that court. If there be any balance due from him on that account, perhaps he may be required, as executor, to settle that. But the court here undertakes to make him account and settle with it for all that he received as husband, and to submit to its judgment as to the credits that shall be allowed him. It could not do this even if the trust were created by the will, over which the court had jurisdiction, much less where the trust existed independently of it, and before the death of the testatrix. See Elliott v. Mayfield, 3 Ala. 223.

PHELAN, J.—The general question involved in this case, is, what is an executor bound to include in his inventory? Our statute on this subject, in the oath which it requires an executor to take, brings him under an obligation to "return a true inventory of the goods, chattels, and credits" of the deceased, "so far as they may come to his knowledge." This inventory is returned under oath, and if an executor is sued for a *devastavit*, his inventory is *prima facie* evidence against him of assets to the extent of the amount therein stated. 1 Lomax on Ex'rs. 378; Ram on Assets, 145–8; Craig and wife v. McGehee et al., 16 Ala. 41.

That, under the head of credits, an executor would be bound to include in his inventory a debt due from himself to the testator, is clear from established doctrine that such a debt is assets. 2 Lomax Ex'rs. 230. This court has decided the question directly in several cases. Childress v. Childress, 3 Ala. 752; Purdom v. Tipton et al., 9 Ala. 914.

But the precise question arising in this case is, whether the husband, who is executor of his wife, is bound to include in his inventory moneys of the wife which he received during the coverture in the character of trustee as her separate property. It appears that Weems, the plaintiff in error, received from his wife's guardian a certain sum in money, and also notes, which were afterwards collected by him. A consider-

able portion of this accrued from the hire of her slaves and the rent of her land after the marriage, in 1849, and to this, as income, he was clearly entitled. But, it also appears, that some portion of this money was of the *corpus* or capital of her estate. Was he or not bound to include in his inventory under oath this sum, whatever it was?

The decision of this question will depend upon another, namely: whether the husband who is executor to his wife is compellable to settle his trusteeship of his wife's estate with the Probate Court?

As to the general doctrine that the Probate Court cannot take jurisdiction of that which is a special trust, even in the case of an executor, and where it is created by will, see the cases of Portis v. Creagh, 4 Por. 332; Leavens v. Butler, 8 Por. 380; Harrison v. Harrison, 9 Ala. 73; and Gerald and wife v. Bunkley, 16 Ala.

I felt for some time averse to bringing a strict trust like this, which, in the course of its existence and execution, would, in many cases, involve the rights of persons not subject to the jurisdiction of the Court of Probate, and who could not be called before it to have their rights adjudicated, into this court for any purpose. But as the jurisdiction is a convenient one, and where the settlement will involve the rights of creditors and distributees only, would be conclusive, I defer in this matter to the majority of the court, and hold, that a husband who is executor, is bound to settle his trusteeship of his wife's estate with the Probate Court.

This makes it necessary that he should state with that court a full account of all moneys or other property of the wife, received by him as *corpus* or *capital* of her estate, and not as *income*, and credit himself with all proper payments or disbursements made by him in her behalf as trustee, so that the balance struck may be a credit of the estate or a debt due by the estate, as the case may be.

The decision of the Probate Court to this effect was therefore proper.

What, we will next inquire, is the husband as executor bound to do in respect to the crops of 1850, or their proceeds? This will depend upon the proper construction of the statutes of this State, passed in 1848 and 1850, "securing to married

women their separate estates." (See acts of 1848 p. 79, and acts of 1850, p. 63.) By the first of these acts, all the property of every kind belonging to a woman at the time of her marriage, is declared to be trust property, to be held for her separate use. Although nothing is expressly said in this act making the husband trustee, the courts held him to be such. Key, adm'r. v. Vaughan and wife, 15 Ala. 497. By the act of 1850, that is expressly declared, which by the previous act was left to implication; and another provision in respect to the rights of the husband is enacted, which very materially affects the question we are now considering. That provision is in these words: "The same (that is the property) shall vest in the husband as the trustee of the wife; and the husband shall be authorized, so long as he may continue such trustee, under the provisions of this act, to have and possess and to control and manage all such separate estate, without liability to account to the wife, her heirs, executors, or assigns, for the rents, proceeds and profits thereof."

This provision was but a slight extension of the rights of the husband, as they had been long established by the courts of equity. 2 Roper on Husband and Wife, and authorities there cited.

Under this provision, there can be no doubt, but that the husband becomes tenant for the life of the wife (*per autre vie*) of the rents and profits of the wife's estate. The right "to have and possess, control and manage" her property during the coverture, without liability to account for rents and profits, makes him so. Like every other tenant for life, he is entitled to emblements, that is, the crop growing or matured, and whether gathered or not gathered, at the termination of the life estate. Ram on Assets, 188. Not being liable to account to any one for the crop that was grown in the year 1850, under this interpretation of the statute, it follows, as matter of course, that plaintiff in error was not bound to include in his inventory the crops of that year or their proceeds. The law makes them his own.

There seems to have been no question made below in regard to the mules, and other stock, the household furniture, &c. The appellant, in his answer, averred that these were purchased with his own money, which was not disproved.

The principles before stated will be sufficient to guide the Probate Court in the further progress of the case.

It follows, that so much of the decree of the Probate Court as requires the appellant to "exhibit, in a new inventory, a full account of all rents and profits which have accrued on the said property, since the same came to his hands, during the lifetime of said testatrix; and that he exhibit a full return of the proceeds of the crop on hand at the time of the death of said testatrix," must be reversed, and the cause is remanded, that the Probate Court may proceed in conformity with the views set forth in this opinion.

BURDEN *vs.* THE MAYOR, ALDERMEN, &c., OF MOBILE.

1. In an action to recover damages for diverting water from the plaintiff's mill, the declaration or statement of the cause of action is demurrable, if it does not show that by such diversion the quantity of water that continued to flow to the mill was insufficient, or that the plaintiff or his mill was thereby injured.
2. Where, the damages claimed being less than twenty dollars, the action is commenced before a justice of the peace, and removed by appeal to the Circuit Court, and the plaintiff there files a statement of his cause of action, to which a demurrer is interposed and sustained, and the plaintiff refuses to amend, the court may render judgment for the defendant, unless the plaintiff offers to try the cause on its merits without any issue in writing.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. L. GIBBONS.

This suit was commenced by Burden before a justice of the peace, to recover damages from the defendants for diverting the water from the plaintiff's mill, the damages claimed in the warrant being less than twenty dollars. Judgment was rendered in favor of the plaintiff, and the defendants removed the case, by appeal, into the Circuit Court. The plaintiff there filed a statement in writing, to which the defendant demurred, and his demurrer was sustained. The plaintiff refused to amend his statement, though informed by the court that he might do so; and thereupon judgment was rendered

in favor of the defendants, from which a writ of error is brought to this court.

PHILLIPS, for plaintiff in error:

By the statute on appeals from a justice, the case is to be tried without regarding any defect in the warrant, *capias*, summons, or other proceedings.

A demurrer to a statement is not allowed. Perry v. Brown, Minor 56; Hart v. Turk, 14 Ala. 676; 15 ib. 471.

The same strictness of pleading is not required. Morrison v. Morrison, 3 Stew. 447; Hanks v. Hinson, 4 Port. 509.

It is not necessary, when the amount does not exceed $20, to make up an issue upon paper. Harbin v. Knox, 6 Ala. 675.

The case in 1 Ala., referred to in Copeland v. Flowers, was upon the point of jurisdiction. If the court is to extend it, and permit it to extend to all cases of defect, then the whole series of decisions is overruled; and the same technicality will be required as is called for by the strict rules of pleading.

But it is insisted that the counts are good according to strict law.

CAMPBELL, *contra:*

1. The plaintiff below filed a statement of his cause of action, as he was authorized to do. The court might have tried the case without a statement, but the plaintiff chose to tender one.

2. That statement contains no cause of action. It only complains that the defendants diverted large quantities of water from the plaintiff's mill; but this is no wrong, unless the mill was thereby deprived of a sufficient quantity of water. 2 Barn. & Cress., 910; 6 Porter 472. The statement being defective, a demurrer would lie to it. Copeland v. Flowers, at present term.

DARGAN, C. J.—We think it very clear that the statement shows no cause of action; for, though it is alleged that the defendants turned and diverted large quantities of water from the plaintiff's mill, it is not shown that he was injured

thereby, or that by such diversion of the water, the quantity that continued to flow to the mill was insufficient, or that the mill was in anywise injured thereby. The authorities referred to by the defendant's counsel fully show, that the water of a running stream may be diverted, if the quantity taken from the stream be not so great as to injure others who have a right to its use. 2 Barn. & Cress. 908; 6 Porter 472.

But it is contended, that as the amount sued for is not over twenty dollars, the court should not have given judgment for the defendant because the plaintiff refused to amend his statement, but should have proceeded to try the cause on its merits, without any issue in writing. I should be inclined to hold that this would be proper practice, inasmuch as no issue is required to be made in cases of appeals from justices of the peace, when the sum claimed is not over twenty dollars.

But the court, however, think that, inasmuch as the plaintiff saw proper to set forth his cause of action in writing, which failed to show a legal liability, that he should either have amended it, or have offered to introduce his evidence and try the cause on its merits, without an issue; and as he refused to amend, and the record does not show that he offered to introduce proof and go to trial without an issue, that the court did not err in rendering a judgment for the defendants. As this difference of opinion, however, is on a mere point of practice, I yield my own to the opinion of the court, and hold that, as the plaintiff refused to amend his statement, he should have offered to go to trial without one, in order to show that the court erred.

Let the judgment be affirmed.

BUNYARD AND WIFE *vs.* McELROY, Ex'r.

1. On the trial of an issue *devisavit vel non*, between the executor, who was also the principal legatee, and another legatee, the declarations or admissions of the executor cannot be received to invalidate the will, which makes provision for himself and several others, even when offered in connection with proof

that it would be to the interest of all the legatees, except the executor, to set it aside.

2. Nor are the declarations of the testator, made by him some six or seven years before the execution of his will, that the executor and his wife "were constantly *ding donging* at him to make a will, but that he would not do it, and never meant to do it; that the law of Alabama would make a good enough will for him," admissible evidence against the executor.

3. The law does not require that the proof of undue influence should be confined to the time of the execution of the will; yet the party offering such proof must show, that it is so connected with the act done as to furnish some reasonable ground of inference that the act was influenced, in whole or in part, by it.

ERROR to the Court of Probate of Sumter.

The will of Isaac McElroy, deceased, was propounded for probate, in the Court of Probate of Sumter, by Isaac R. McElroy, the executor, who was also a son of the testator and his principal legatee. The validity of the will was contested by James Bunyard and his wife Delia, who was a daughter of the testator, and also a legatee; whereupon, an issue *devisavit vel non* was made up and submitted to a jury, who decided in favor of the validity of the will.

A bill of exceptions was sealed at the instance of the contestants, which sets out the following state of facts: "The contestants offered a witness, who was well acquainted with decedent, and who visited him four days before the will was made, and who testified as to the mental and physical condition of decedent at such visit. Contestants then asked the witness to state any conversation he had with the executor at that time. An objection being made by the attorneys for the executor, the court ruled that the contestants could not prove the declarations of the executor generally, but might prove such as would go to show that the executor had exercised undue influence, in procuring the will to be made. Contestants then offered to prove by said witness, that he, "on reaching the executor's house, with whom decedent was living, and had lived for many years, inquired of the executor and his wife how the old man was, meaning decedent; and the executor replied, 'the old man was very delirious, and had lost his mind entirely;' that the contestant and his wife (who was the daughter of the testator,) had come to the house of the executor, where the old man was lying sick, on the Thursday

before, and stayed until the following Sunday morning, and that the old man, during all this time, had never recognized his said daughter." The attorney for the contestants, in offering to make this proof, stated, that he should show, in order to strengthen his proposition to admit said confessions of the executor, that it was to the interest of all the legatees, except the executor, (and that he was the principal legatee,) to have the will set aside. To the introduction of these admissions of the executor his attorney objected, and the court ruled that they were inadmissible; and to such ruling the contestants excepted.

During the progress of the trial, the contestants, as a circumstance tending to show the exercise of undue influence by the executor over the testator, and the principal one, the other circumstances being merely presumptive evidence, offered to prove by a witness, that, six years or more before the making of the will, the decedent had told the witness "that his son (the executor) and the executor's wife were constantly ding-donging at him to make a will, but that he would not do it, and never meant to; that the law of Alabama would make a good enough will for him." Much testimony had, before this, been offered by both sides; tending to prove, for the executor, that decedent was of sound and disposing mind when the will was made, and by the contestants he was not. The court ruled the proof offered inadmissible, and contestants excepted."

The only error assigned is: "excluding the evidence offered by contestants, as shown by the bill of exceptions."

HUNTINGTON, for plaintiff in error:

The court ought to have admitted the declarations of the executor, because he was a party to the record in adverse interest, being the sole devisee, though he took the bequest charged with certain conditions. In the court below it was offered to be shown, in support of the proposition to use his admissions, that it was in fact to the interest of all the other beneficiaries under the will, that the same should be set aside.

In Roberts v. Trawick, the declarations of the executor were held inadmissible, because he had no interest under the will, and therefore could not be permitted to prejudice the

rights of the legatees by his mere admissions. 13 Ala. 79, 80. He was likened to a nominal plaintiff, in regard to whom this court has held, that his admissions, made after parting with the note sued on, cannot be given in evidence to defeat the beneficial plaintiff. Head, use, &c. v. Shearer, 9 Ala. 791.

This case is different on account of the interest of the executor, and comes directly within the pale of Davis v. Calvert, 5 Gill & Johnson 269—a strong case in our favor, and recognized by this court in Roberts v. Trawick, 17 Ala. 58.

See the last case to the point that the court erred in excluding the declarations of the testator, as shown in the bill of exceptions. If he was of unsound mind when the will was made, or acting under undue influences, (each of which was to be determined by the jury,) we had a right to strengthen the presumptions on this head, by showing what his intention was at any time; and the other side could have rebutted, by showing that the intention was subsequently changed. Without such rebutting proof, the presumption would have been that the intention remained unaltered, upon the same principle that a partnership or marriage once proved, is presumed to be continuing until its dissolution is made manifest. This principle is a general one, and the above particular applications of it are only for the sake of illustration.

R. H. SMITH, *contra:*

1. In propounding a will for probate the executor is not bringing a suit. He only informs the court of the existence of the will, &c.; the court institutes the suit, &c.

Hence the executor does not, properly speaking, occupy the relation of party to the suit. He cannot withdraw or dismiss the suit, cannot consent to any given result. He is an actor in this case for himself and others, each having a common, but not a joint interest in the result.

Even were all the non-contesting legatees actually and formally parties with the executor, the admissions of one could not be given in evidence against all; for the rule is, that to authorize such admissions there must not only be a common but a joint interest. 1 Greenleaf's Ev., § 174; 4 Cowen's R. 472; ib. 494.

2. The exclusion of the admissions in this case stands on

other grounds than apply to an ordinary suit, as shown by Roberts v. Trawick, 13 Ala. 68; Nussear v. Arnold, 13 Ser. & R. 328; Phelps v. Hartwell, 1 Mass. 71.

The first question is too large and general, and the rule adopted by the court was quite too favorable for plaintiff in error.

The other questions are amenable to the criticism in 1 Mass. R. 71, they embracing the executor's opinion as to the condition of the testator's mind, as well as facts.

3. The rule is, that assertions of testator, to be evidence, must be so near the time of making the will, as to be part of the *res gestae*. To this is the following exception: You may prove, in favor of the will, a continuing state of mind, by showing that, long previous to the will, testator declared his intention to be in accordance with the will; this tends strongly to show that the character of the will had long been settled in his mind; but to destroy a will by proving the testator, six years before, declared he would not make a will, would be to say every man must stick to every good or ill intention, and if he changes it, it will be evidence against the will. 13 Ala. 68; 2 Greenl. Ev., § 690.

CHILTON, J.—This was a contest upon an issue *devisavit vel non*, in the Probate Court of Sumter, upon the will of Isaac McElroy, deceased.

The will gives legacies to several persons, the executor himself being one of the legatees.

The first question is, whether the admissions of the executor can be received to invalidate the will, which makes provision not only for himself but several others. We examined this question with much care in Roberts v. Trawick, 13 Ala. 68, and there decided it adversely to the plaintiff in error. True, in that case the declarations of the principal devisee were offered to impeach the will, which made provision also for others; but we think the principle is the same, whether such devisee be the executor or one having a legacy merely in common with others. All the legatees did not contest this will, and although it is stated that these admissions were offered in connection with proof that it would be to the interest of all but the executor to set it aside, nevertheless, we

cannot assume that those legatees who are satisfied with the provision made for them, consented to the admission of testimony to defeat their rights under it.

The proof of the declarations made by the testator some six years or more before the making of the will, that the executor (who was testator's son) and his wife, were constantly "ding-donging at him to make a will, but that he would not do it, and never meant to do it; that the law of Alabama would make a good enough will for him," we think, was properly rejected. Now, as we said in Roberts v. Trawick, 17 Ala. 58, the rule is not so stringent, as to require that proof of undue influence should be confined to the time of the execution of the will. Yet the party offering such proof must show, that it is so connected with the act done, as to furnish some reasonable ground of inference that the act was influenced in whole or in part by it.

There is no such connection proved in this case. The executor and his wife might, six years before the will was made, have importuned the testator to make a will; but it does not follow that they were desirous to induce him to make an improper one, or that the one made six years thereafter was the result of such persuasion. No reasonable inference adverse to this will could be drawn from the fact, that, six years or more before it was executed, the testator said he would no make a will, although the executor and his wife were "ding-donging" at him to do so. It is too remote from the fact alleged to have been influenced by it, and, disconnected from proof of continuous intervening persuasion, should have been rejected, as well calculated to mislead the jury, and to deny to the testator the right which every one has of changing his mind in respect to the disposition of his property by will.

Let the judgment be affirmed.

VAN EPPES *vs.* SMITH.

1. A *certiorari*, to remove a cause from a justice's court into the Circuit Court, should not be dismissed because the petition does not set forth a sufficient reason for its issuance.
2. A person dealing with one who professes to be an agent for another, is bound to know the extent of his authority; and the agency must be proved by other evidence than the acts of the supposed agent, before it can be assumed that his acts are binding on the principal.
3. The Appellate Court will only consider such errors as are assigned and insisted on.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

Smith sued Van Eppes and one Stall by warrant before a justice of the peace, on an account for work and labor done, to the value of $23. The warrant was executed on both defendants, the case was tried, and judgment rendered for the defendants. Smith brought the case to the City Court of Mobile, and there filed his statement against Van Eppes alone, and it does not appear that his co-defendant, Stall, was, at any time, treated by the pleadings, on the trial, or in the judgment, as a party to the suit in the City Court. Van Eppes pleaded the general issue, and a trial was had on the merits of the case.

Before the trial commenced on the merits, the defendant's counsel moved to dismiss the petition and writ of *certiorari*, because no sufficient reason was stated in the petition why the plaintiff did not appeal from the judgment of the justice of the peace. The motion was overruled, and the defendant excepted.

On the trial, as appears by the bill of exceptions, Stall was examined as a witness, and deposed that he had requested the plaintiff to do the work for the value of which the suit was brought; that it was agreed that plaintiff should receive $23; that Van Eppes was absent at the time, and knew nothing of it; that Van Eppes owned a livery stable, and witness attended to the letting out of horses and carriages to hire, and re-

ceived the money for such hire, which he paid over nightly to one Austin, to whom Van Eppes directed him to pay it in his (Van E.'s) absence. The work done by plaintiff was the putting up of an awning in front of the stables. Witness had no authority to make the contract, other than that before stated; that Van Eppes did not enlarge his authority when he went away; that witness paid over the money nightly to Austin, as he had been directed to do.

Austin proved, that he and A. W. Van Eppes were the general agents of the defendant, with full powers; that this fact was made known to the world by advertisement in a city paper; that as such agent, he had discharged Stall from his employment, before the contract was made with plaintiff; he further proved, that he positively forbid the plaintiff from putting up the awning, when he came for the purpose of doing so, and told him, if he did put it up, neither witness nor Van Eppes would pay him for it. There was other testimony given on both sides, but it does not vary this proof or affect it materially.

The court charged the jury, that a man might have several agents with full powers to do the same act, and if plaintiff had ground sufficient to satisfy an ordinarily reasonable man of the agency of Stall, and that he had performed the work and delivered it, before he was informed to the contrary, it would be sufficient to charge the defendant; that the publication in the Gazette, could not be considered as notice to the defendant of the agency of Austin and A. W. Van Eppes, unless it was shown that the plaintiff was a subscriber to the newspaper in which it was made, or was in the habit of reading the paper, or had been informed of, or seen the advertisement itself. Defendant's counsel asked the court to charge the jury, that, before they could find for the plaintiff, they must be satisfied from the facts and circumstances in proof, that the plaintiff had authentic knowledge of the agency of Stall; which charge the court refused to give. The defendant excepted to this refusal to charge, and also to the charge given by the court.

The refusal of the court to dismiss the petition for certiorari and the writ, the charges given, and the charges refused, are here assigned for error.

WM. G. JONES and RAPIER, for plaintiff in error:

1. The *certiorari* should have been dismissed, because the petition shows no reason why an appeal was not taken from the judgment of the justice.

2. The original warrant was against Van Eppes and one Stall jointly, and was returned "executed" generally. In the City Court, the plaintiff declared against Van Eppes alone. This was a discontinuance as to both. 8 Ala. 491; ib. 810; 9 ib. 127; 8 Porter 49; 5 S. & P. 206; 1 Stew. 62.

3. The court also erred, in the charge to the jury as to the proof of agency, and the refusal to charge as requested. The doctrine is well settled, that a party dealing with one who professes to act as agent, is bound at his peril to inquire into his authority, and must prove the agency. 3 Stew. 23; 9 Porter 210; Paley on Agency 309.

G. N. STEWART, *contra.*

LIGON, J.—The motion to dismiss the writ of *certiorari*, because the reasons set forth in the petition for it were not sufficient to authorize its issue, was correctly overruled by the court below. The statute which allows appeals and writs of *certiorari* to judgments rendered by justices of the peace, declares, that when such cases reach the appellate court, they shall be tried *de novo* on their merits, upon issues made up under the direction of the court, thus indirectly forbidding their dismissal for any irregularities in the manner of bringing them before that court.

On the trial, it appears by the bill of exceptions, the court charged the jury, "that a person may have several agents, with full powers to do the same act, and if the plaintiff had ground sufficient to satisfy an ordinarily reasonable man of the agency of Stall, and that he had performed the work and delivered it, before he was informed to the contrary, it would be sufficient to charge the defendant." This, as a proposition of law, cannot be supported. The inferences of a party dealing with one whom he supposes to be the agent of another, deduced alone from the acts of such supposed agent, are no proof of agency, and the jury should not be told to look to them as such. In Scarborough v. Reynolds, 12 Ala. 253, it

is held, "that the agency of a party must first be proved by other evidence than his acts, before it can be assumed that his acts are binding on the principal." Some act of the principal, in relation to the thing done, is indispensable to make out the agency, and the pretensions and acts of the party assuming to be the agent have no foundation upon which to rest, until the principal is thus connected with them.

The text books lay it down as a rule in such cases, and this court has repeatedly reiterated it, that, when a person deals with one who professes to be the agent of another, the person contracting with him is bound to know the extent of his authority. Paley on Agency, 309; Fisher v. Johnson & Campbell, 9 Por. 210; Gullett v. Lewis, 3 Stew. 23. But the last part of the charge in this case assumes the law to be, that if a party deal with one whom he reasonably supposes to be the agent of another, the contract is binding on the latter, unless he informs the dealer before the contract is completed that the professed or supposed agency does not exist. This is manifestly erroneous, and based upon a misconception of the law; for under it the burden of proof is thrown on the defendant, and he is required to prove the want of authority of him who unauthorizedly intermeddles in his business; when by the rules of law, it is on the plaintiff to show the fact of agency.

In the brief of the counsel for the plaintiff in error, our attention is called to the fact shown by the record, that the parties before the justice of the peace, and those to the issue in the City Court, are not the same, and it is insisted that the case should be reversed for this error also. We decline pronouncing an opinion on this part of the case, because no point appears to have been made on it in the court below, or in the assignment of errors in this court, and we will not consider errors unless they are assigned and insisted upon.

For the error shown above, let the judgment be reversed and the cause remanded.

CLEAVELAND ET AL. *vs.* McADAMS, EXR'X.

1. Where a party has a right of recovery over against another, the party thus liable may defend in any suit commenced against the person to whom he is liable; but the defence in such case is conducted in the name of the defendant on the record, and the court is not authorized to render judgment against both parties.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. McKINSTRY.

An action of detinue was brought by the defendant in error against one Hutchinson. The writ and declaration are filed against Hutchinson alone, and the pleas are in his name only. The judgment entry is as follows. viz:

"Martha McAdams, Ex.

vs.

James F. Hutchinson, Sheriff of Mobile County.

This day came the parties, by their atterneys, and also came Geo. A. Cleaveland and Mary E. Cleaveland, his wife, by their attorneys, by leave of the court, who admitted them to defend with James F. Hutchinson, sheriff as aforesaid; and the demurrer of the plaintiff to the plea of the defendant secondly above pleaded, being considered by the court, the same is sustained; and thereupon came a jury of good and lawful men, who, on their oaths, do say they find the defendant guilty," &c. "It is therefore considered, that the plaintiff have and recover of the said defendants," &c.

To reverse this judgment, Mary E. Cleaveland alone sues out a writ of error.

RAPIER, for plaintiff in error.

PHILLIPS, *contra.*

GOLDTHWAITE, J.—Where a party has a right of recovery over against another, the party thus liable may defend in any suit commenced against the person to whom he is liable; but the defence in such case is conducted in the name of the defendant on the record, and the court is not authorized to

render judgment against both parties. In the present case, it does not appear that Cleaveland and his wife were admitted as parties to the record, but that they were admitted with leave to defend, which would not authorize them to be placed in the judgment as defendants.

As the writ of error, however, is not sued out in the name of all the defendants, it must be amended, so as to correspond with the judgment, and the judgment must be reversed, and be here rendered against the defendant Hutchinson alone.

ROSS (CREDITOR) *vs.* ROSS (ADM'R.)

1. A written instrument in the following form, viz: "This day received of R. two hundred and twenty dollars, for the payment of which by the 25th Dec'r. next, I hereby assign over to said R. the free and full title to a certain negro girl named Hulda," is a mortgage of the slave, and not a bill of sale.
2. In the absence of an express stipulation to the contrary, the mortgagor is entitled to retain possession of the mortgaged property until the law day, and he has the right to vindicate this possession against all persons who unlawfully withhold it; it is also his duty to look after the property, and if a loss occurs in consequence of the negligence of any one in looking after it, the loss must fall upon the party primarily guilty of the negligence, viz: the mortgagor.
3. The case of Ross (Creditor) vs. Ross (Adm'r.), 20 Ala. 105, re-affirmed.

ERROR to the Court of Probate of Randolph.

This was a contest before the Court of Probate, concerning the validity of a certain claim filed by Frederic Ross, the plaintiff in error, against the estate of Andrew Burnham, deceased, which had been duly declared insolvent, and of which said Ross was administrator *de bonis non*. The contest was carried on, under the statute, between said Ross as plaintiff, and himself as administrator *de bonis non* as defendant, defending in behalf of James Pearson, an objecting creditor.

Pearson objected to the claim of Ross, because it was not on file on the last day allowed for filing claims against said estate, at which time he demanded an inspection of it. But his objection was overruled, as it appeared that the claim

had been filed in time, and had afterwards been temporarily withdrawn, by permission of the judge of probate. The facts relating to the withdrawal of the claim are identical with those of a previous case between the same parties, decided at the last January term, and reported in 20 Ala. 105.

The parties went to trial on the validity of the claim, it being agreed between the counsel, that a declaration and all other pleadings applicable to the case should be considered as filed. The claim preferred by Ross was an instrument of writing, of which the following is a copy, viz:

"The State of Alabama, Randolph County:

This day received of Frederic Ross two hundred and twenty dollars, for the payment of which, by the 25th Dec'r. next, I assign over to said Ross the free and full title to a negro girl, named Hulda. November 13, 1844.

(Signed) ANDREW BURNHAM.

THOMAS DOTHARD."

which instrument was shown to have been made by Burnham on the day of its date, and delivered to Ross. The circumstances under which it was given, were as follows:

One Finley had recovered a judgment against Burnham for $550, and an execution issued thereon had been levied on said slave Hulda. To prevent the sale of the slave under the execution, Burnham borrowed about $225 from one McKee, and gave him a lien on the slave to secure its re-payment. McKee soon afterwards demanded the re-payment of the money, and Burnham borrowed the amount from one Thomas Dothard to pay him, at the same time giving Dothard a lien on the slave. Dothard soon after demanded the re-payment of his money, and Burnham then borrowed $220 from said Ross, with which he paid Dothard, and gave Ross the instrument above set forth; but the slave never was in the possession of Ross.

"There was also proof that, a short time before Burnham's death, and while he was sick, Ross went to him, and told him that Mr. Montgomery, an attorney, had informed him that the instrument which he held was not a demand for the payment of money, but a claim or bill of sale for the title to a slave; that Burnham took the paper, and, after reading it

over, stated, that he owed Ross the money mentioned therein, for he knew Ross had never got the slave Hulda."

There was also proof that, the day after Burnham paid McKee the money which he got from Dothard, one Christie, as the agent of Burnham, sent one Foye to Cobb & McKee's, where said slave then was, for the purpose of getting her; but Foye did not succeed, and she was never put in the possession of Ross.

"The counsel for the contesting creditor asked the court to charge:

1. That if a loss had occurred to any person, the bill of sale vested the legal title to the slave in Ross, and that he should bear it, and that the purchase money in the bill of sale was not a legal claim against the estate of Burnham;

2. That the admission of Burnham in the conversation aforesaid, was not a sufficient acknowledgment or promise; and that it was not upon a consideration that would make the bill of sale a valid claim against the estate of Burnham."

The court refused each one of these charges, and to each refusal Pearson excepted, and now assigns them for error.

FALKNER, for plaintiff in error.

HEFLIN, *contra.*

PHELAN, J.—The instrument made and delivered by Burnham to Ross, on the 1st November, 1844, is a mortgage of the slave Hulda mentioned in it, and not a bill of sale. It is manifestly intended only to secure to Ross the repayment of the money received by Burnham on the day mentioned, to-wit: December 25th, next following the date of the instrument, by a lien on the property.

In the absence of an express stipulation to the contrary, Burnham was entitled to retain possession of the slave so mortgaged until the law day, December 25, 1844; and he had the right to vindicate this possession against all persons who unlawfully withheld the slave, whether it was McKee, a prior mortgagee, whose debt had been satisfied, or even against Ross himself. If the agent of Burnham, who went after the slave to McKee's, failed to get her, it was the business of

Burnham to look more diligently after her. As against McKee, or any other person, Ross may have done the same thing, it is true, but it was the business of Ross himself before all others. If a loss occurred, in consequence of the negligence of any one in looking after the slave, the loss must fall upon the party primarily guilty of the negligence, and that was Burnham, the owner.

As this point settles the right of Ross to sue for the money which he advanced, upon the written instrument itself, it is needless to inquire what effect is to be given to the subsequent admissions of Burnham, that he owed Ross the money, and that Ross had never got possession of the slave.

The objection offered to this claim, that it was not filed in time, is made upon precisely the same state of facts presented in another case between the same parties, which was before this court at the last term, 20 Ala. 105. We there held that the objection was properly overruled, and we shall follow that decision in this case.

Under the view we take, the charges asked of the court were properly refused; and the judgment is affirmed.

KIDD AND STAINTON *vs.* McMILLAN.

1. A court has no authority to set aside a final judgment, after the term at which it was rendered is closed.
2. Yet if the parties agree that the judgment may be set aside, and the cause tried again, and the court, in pursuance of such agreement, does set aside the judgment and proceed to try the cause again, the second judgment is not void for want of jurisdiction.
3. But the court is not bound, *even when the parties consent*, to set aside a final judgment at a term subsequent to its rendition, and to re-try the cause.

ERROR to the Circuit Court of Monroe.

Tried before the Hon. JOHN BRAGG.

BLOUNT & CUMMINGS, for plaintiffs in error:

1. Consent cannot give jurisdiction; but where a court has jurisdiction of a matter, the parties may agree to a re-hearing

or new trial. Such an agreement is binding if it is on good consideration. Ransom v. Peters, 2 Ala. 647; Nabors v. Camp, 14 Ala. 460.

2. A release of a judgment founded on good consideration, is a discharge of it, though not under seal. Wentz v. De Haven, 1 S. & R. 312; Whitehill v. Wilson, 3 Penn. Rep.; Benjamin v. McConnell, 4 Gilman.

3. In this case the consideration is a good one. Chitty on Con. 38. The agreement is in fact a release of the judgments, and no execution can issue on them. See cases above cited, and Dearborn v. Cross, 7 Cowen 48.

WILLIAMS & COCKE, *contra:*

1. The court has no power to set aside a judgment rendered at a previous term, except by consent of the parties. Noland et al. v. Lock, 16 Ala. 52; Walker v. Hale, 16 Ala. 26.

2. The motion in this case is not to set aside the execution, or restrain action, but in substance to set aside a former judgment, under an agreement, which being resisted, the party must be left to his remedy at law, or by some other proceeding than to restore case on the docket.

DARGAN, C. J.—This suit was commenced by McMillan against the plaintiffs in error, to recover a sum due on a promissory note. After the commencement of the action, an ancillary attachment was sued out, and James L. Lowell was summoned as a garnishee. Judgment by *nil dicit* was rendered against the defendants at the March term, 1851, they having withdrawn their plea; and a judgment was also rendered against the garnishee.

After this judgment was rendered, and execution had issued upon it, the parties entered into a written agreement, by which it was agreed, that the judgment against the defendants, Stainton & Kidd, and also the judgment against Lowell, the garnishee, should be set aside, and the cause again put upon the docket and tried *de novo*. At the next term subsequent to the making of said agreement, the parties appeared, and moved the court to set aside the judgment, and to reinstate the cause on the docket for trial; but it appearing to the court that a final judgment had been rendered, the motion was re-

fused. To the refusal of this motion the defendants excepted, and have brought the case to this court by writ of error.

It is very clear, that the court has no authority to set aside a final judgment after the term is closed at which it was rendered. Noland v. Lock, 16 Ala. 52; Walker v. Hale, ib. 26. But if the parties agree that it may be set aside and tried again, and the court, in pursuance of such agreement, does set the judgment aside, and proceeds again to try the cause, the second judgment is not void for want of jurisdiction. Lee v. Hogan, admr., decided at the last term.

But the question before us is, whether the court is bound by law, even when the parties consent, to set aside a final judgment, at a term subsequent to its rendition, and re-try the cause. We think not. There must be a time when litigation must end, and that time is, after the adjournment of the court at which the final judgment was rendered. If the court was bound to try the cause again, at the request of the parties, there would be no end to litigation, if they saw proper to set aside the judgment rendered, and try the cause again; and thus the courts of the country would be compelled from time to time to re-try causes, to suit the caprice or whims of the parties. This, in my judgment, the courts are not bound to do. True, if it is done, we will not hold that the court acted without authority or jurisdiction. But we think the court may refuse to re-try the cause without violating any principle of law.

There is no error in refusing the motion, and the judgment must be affirmed.

GRIER *vs.* CAMPBELL.

1. In a suit against a non-resident defendant commenced by attachment, if the plaintiff makes a simulated levy on property to which the defendant has no claim of right, the levy will not have the effect of constructive notice, so as to authorize the court to render judgment; a judgment predicated on such levy is no more binding than a judgment rendered upon ordinary process of

which the defendant had no notice whatever; and it is immaterial what length of time elapses between the levy and rendition of judgment, since the court has no jurisdiction to render any judgment at all.

2. *It seems*, that, upon the authority of Thornton v. Winter, 9 Ala. 613, the levy of an attachment, in good faith, upon a brass candlestick, really the property of the defendant in the attachment, would be sufficient to sustain a judgment against the defendant, such levy falling within the letter of the statute; but whether such levies conform to the spirit and intent of the statute, and should not be wholly disregarded, upon the maxim "*de minimis non curat lex*." *Quaere?*
3. Where a judgment is rendered against a non-resident defendant in an attachment suit, predicated upon a mere colorable levy of the writ upon a chattel of trifling value as the property of the defendant, to obtain relief against which he files his bill in equity, alleging that he was not indebted to the plaintiff, which allegation the plaintiff in his answer denies, the judgment thus obtained does not impose upon the complainant the *onus* of proving the negative allegation, that he was not indebted to the plaintiff in attachment.
4. The lapse of two years and eight months from the rendition of a judgment at law, held, not such as to bar relief in equity against it.
5. When a bill is dismissed by the Chancellor, upon the final hearing on bill, answer, exhibits and proof, and the cause is brought to the Appellate Court by writ of error, where the decree is reversed, that court will not remand the cause, that further evidence may be taken, but will render such decree as the Chancellor should have rendered.

ERROR to the Chancery Court of Macon.
Heard before the Hon. W. W. MASON.

This was a bill filed by Grier against Campbell, in the Chancery Court of Macon county, charging that, the plaintiff being a citizen of the State of Georgia, Campbell sued out an attachment against him, on the 2d November, 1844, for the recovery of $\$232\frac{65}{100}$, which writ was levied on the 11th March, 1845, on one brass candlestick by the sheriff of Macon county; that, on the 19th October, 1846, judgment was rendered on said writ of attachment in the Circuit Court of Macon, to which court said writ was made returnable, in favor of Campbell, and against the plaintiff, for the sum of $\$279\frac{99}{100}$, besides costs, &c.

Complainant averred that he had never been a citizen of the State of Alabama; was not in the State either when the attachment issued, or when it was levied; that he had no property in the State then or previous to that time; that the candlestick levied on was not his, and that he had no notice of the proceedings until the sheriff called on him with an

execution issued upon said judgment: that he was not indebted to Campbell at the time of the issue of said attachment, and could have defeated his action if he had received any notice of their pendency, and that he does not believe Campbell can in any way establish an indebtedness against him. He, therefore, prayed an injunction, and that the same, on final hearing, might be rendered perpetual. The bill was filed July 19, 1849.

An injunction was duly granted, upon the filing of a release of errors, and giving bond as required by the *fiat* of the judge awarding it, and Campbell, having been served with process of subpœna, answered the bill substantially as follows: Admits the issue of the attachment, its levy, the rendition of judgment and that he caused an execution to be placed in the sheriff's hands as charged; does not admit that, when the process of attachment was sued out, the said Grier had no property in this State, but says he was informed creditably that he owned property in this State of considerable value; that he does not know whether the candlestick levied on was or not the property of the plaintiff, and has no information beyond that furnished by the levy and the bill; avers that the attachment issued more than six months before the judgment was rendered, and insists that this amounted to constructive notice: is not able to state when complainant first received actual notice of the judgment; denies the charge that the complainant was not indebted to him, or that he could have successfully defended against the action; insists, on the contrary, that he owed him the sum of $\$232\frac{65}{100}$, for so much paid out for complainant's use in this: that several years before the issue of the attachment, the complainant had instituted suit in respondent's name, but without his knowledge or consent, in the Circuit Court of Autauga; that in consequence of this unauthorized act, respondent was compelled to pay, by execution, the above sum, and this judgment on the attachment is for the sum so paid, and was justly due and remains unpaid.

The sheriff, who made the levy of the attachment, was examined as a witness, and states, that he knew of no property of Grier in this State; that a candlestick was pointed out by the attorney for Campbell, which was in the said at-

torney's office, and he was requested to levy the attachment upon it, and did so, but never took it into his possession, or any bond for its delivery. He left it where he found it, and knows nothing as to what became of it.

The complainant below also proved, by Selden S. Walker and Thomas Flournoy, that he resided in the State of Georgia, and had never lived, or. to their knowledge, owned any property in this State, except notes which he had on persons residing here. This was all the proof, except the record of the proceedings on the attachment.

Upon this proof, the Chancellor, on the final hearing on bill, answer, exhibit and proof, dissolved the injunction, dismissed the bill at the complainant's cost, and decreed the injunction bond to have the force and effect of a judgment at law, and that the defendant recover of the complainant six per cent. upon his judgment at law, as damages sustained by the suing out of the injunction.

This decree is assigned for error, and the plaintiff in error insists that the injunction should have been rendered perpetual, and that the Chancellor erred in awarding damages.

P. T. SAYRE, for plaintiff in error:

1. The case made by the record, falls within the influence of the principle decided in the case of Crafts v. Dexter, 8 Ala. 767: see, also, Jones v. Pope, 6 Ala. 154.

2. It was necessary for the complainant to aver that he owed the defendant nothing, otherwise he would have shown no injury. This negative averment, however, did not have the effect of shifting the burthen of proof on the plaintiff. 8 Ala. 771; ib. 750; 6 ib. 726. The party who alleged an indebtedness must prove it. 10 Ala. 311; 2 Phil. Ev. C. & H. notes, pp. 475, 478.

G. W. GUNN, *contra*, contended:

1. That, as the bill was filed to enjoin a judgment at law, it was incumbent on the complainant, not only to aver the judgment was unjust by reason of some defence going to the whole recovery, but he must show this by proof. 19 Ala. 224; ib. 686; 7 Por. 549; 2 Ala. 20; 9 ib. 120. That the bill does not aver the judgment is unjust, but merely, that

the plaintiff did now owe, &c. The allegations must be taken most strongly against the pleader. 16 Ala. 423.

2. The answer is responsive, and must be taken as true; 3 Stew. 95; 3 Ala. 458; 15 ib. 600; 14 ib. 370; and especially in this case, where fraud is charged. 4 Ala. 60; 1 S. & P. 317.

On dismissing such bill, damages should be given. 10 Ala. 596. The party had constructive notice. 6 Ala. 373; 4 ib. 527; 9 ib. 613; 8 Por. 245. The levy was sufficient, if made in good faith. 6 Ala. 373; 4 ib. 527; 9 ib. 613; 8 Por. 245. The lapse of time should operate against this application.

CHILTON, J.—In consequence of the impracticability of effecting personal service upon defendants in many cases, the statutes have prescribed certain modes of procedure, which are regarded as legal or constructive notice to them, so as to authorize the rendition of judgment.

One of the means provided, when the circumstances justify it, is the issue of an attachment, which, when duly levied upon the defendant's property, is considered as bringing him into court, since it is but a reasonable inference, from the relation which the defendant bears to his property, that he will be put upon inquiry concerning it, and thus be brought to a knowledge of the process by which it is impounded.

But care must be taken that the property levied upon is the property of the defendant: for it is too clear to admit of argument, that if the plaintiff make a simulated levy on property to which the defendant has no claim of right, this will not have the effect of constructive notice so as to authorize the court to proceed to judgment. Indeed, a judgment predicated upon such levy, is no more binding than a judgment rendered upon ordinary process, of which the defendant had no notice whatever. And it is wholly immaterial what length of time transpires between the levy and judgment, inasmuch as the court does not acquire jurisdiction of the cause, and cannot, therefore, properly render any judgment against the defendant.

It has been decided, that the levy of an attachment upon a pair of shoes, if really made, and the shoes are of any

value, is sufficient. Thornton v. Winter, 9 Ala. 613. And, by parity of reasoning, the levy in good faith upon a candlestick, although not worth more than a dime, if it was really the property of the defendant in the attachment, would be sufficient to sustain the judgment. Such levies fall within the letter of the statute, as they are made upon "the goods of the defendant;" but whether they conform to its spirit and intent, and should not be wholly disregarded, upon the maxim "*de minimis non curat lex*," is a question worthy of consideration, and one which we prefer to consider as open, notwithstanding the decision in Thornton v. Winter, *supra*, since the view we take of this case renders its decision unnecessary.

It is hardly necessary to repeat the facts proved in regard to the right of property in the candlestick levied upon in this case. It is very clear that it was not the property of Grier. It was not in his possession, but in the possession of the counsel for the plaintiff, who pointed it out as the subject of levy. The bill explicitly charges, that it was not the property of the complainant, and the defendant denies all knowledge concerning it, save such as he obtained from the bill and levy, and, therefore, neither admits nor denies the fact as charged. The plaintiff is proved to have been a resident, at the date of the levy and for years previous thereto, of the State of Georgia, and a permanent planter in that State, without property, except, perhaps, notes, in this State. Superadd to all this the fact, that the person in whose possession the candlestick was found, and who must be presumed to have known more about the ownership of it than any one else, has not been examined. We cannot hesitate to pronounce that the levy was not real, but colorable merely, and that the judgment founded upon it was wholly unwarranted.

Whether this of itself would not justify the Court of Equity to interfere and afford relief, by putting the parties on a legal equality, leaving them afterwards to contest the question of indebtedness in a court of law, we need not now decide. Certain it is, that a judgment thus obtained, cannot have the effect of imposing upon the plaintiff the *onus* of proving the negative allegation, that he does not owe the alleged indebtedness.

The plaintiff distinctly avers the jurisdictional fact, that he

did not owe the demand. This is equivalent to an averment that the judgment was unjust. He could not be supposed, from the nature of the case, to be able to prove this negative assertion; whereas, the plaintiff, if such indebtedness did in fact exist, could easily have proved it. Carpenter v. Devon, 6 Ala. 718; Crafts v. Dexter, 8 ib. 767, and authorities cited in these cases.

The lapse of time intervening between the rendition of the judgment and the filing of the bill, is not such as to bar the relief sought by the plaintiff.

Upon the whole case, our conclusion is, that the Chancellor clearly misconceived the law, and his decree must, therefore, be reversed.

We are asked, in the event of a reversal, to remand the cause, that further evidence may be taken, &c. But this is contrary to the practice, and to the statute, which requires us to render such decree as the Chancellor should have rendered.

Let a decree be here entered, reinstating and perpetuating the injunction, but without prejudice to the right of the defendant to sue in a court of law for the demand upon which the said judgment was rendered; and let the defendant pay the cost of this court and of the Chancery Court.

EVANS AND EVANS, Admrs. vs. LAMAR.

1. An execution in the hands of the sheriff is not a lien upon the ungathered crop of the defendant.
2. A deed conveying property absolutely to the trustee for the payment of certain specified debts of the grantor, which contains no reservation or stipulation of any benefit to the grantor, and imposes no condition prejudicial to, or restrictive of the rights of the secured creditors, or tending to delay them in the collection of their debts, is not fraudulent on its face, although it gives the trustee a discretion as to the time and manner of selling the crops conveyed by it; if the trustee, in such case, refuse to act promptly, or within a reasonable time, the secured creditors might compel him in equity to do so, or have him displaced and another appointed.

Error to the Circuit Court of Autauga.

Tried before the Hon. A. B. Moore.

On the 25th August, 1849, George R. Evans sued out a writ of *fi. fa.* against Obediah Lamar, on a judgment in his favor in the County Court of Autauga, for the sum of $632,06, which came to the hands of the sheriff of that county, on the 29th August, 1849, and was returned by him endorsed "not received in time to make the money," on the 13th September, 1849. An *alias fi. fa.* was issued on the 13th, and came to the hands of the sheriff, on the 15th September, 1849. This *fi. fa.* is returned, levied on 4 bales of cotton, 7,000 lbs. ginned cotton and 8,000 lbs. seed cotton, on 12th Oct., 1849. It is further returned that this property was claimed by Dent Lamar, and bond given for the trial of the right. The cause was continued for four terms, at one of which the death of the plaintiff was suggested, and the cause was revived in the name of his administrator and administratrix.

On the trial, as appears by the bill of exceptions, after the plaintiff in execution had shown his levy, and that the property was in the possession of Obediah Lamar when the levy was made, the claimant introduced a deed of trust made by Obediah Lamar to himself, dated the 3d September, 1849, by which the growing crop of cotton, corn, &c., of the former, was conveyed to the latter absolutely, but on trust that he would pay certain simple contract debts and judgments to sundry persons therein named, amounting in the whole to about $3,500, all of which, at the time of the making of the deed, were past due. The deed stipulates, that "it is agreed between the parties, that he (Dent Lamar, the trustee,) is hereby authorized and empowered, to sell all or any part of the said crop of corn, fodder or cotton, either at private or public sale as he may deem best, and at such times as he may deem proper, either for cash or on credit, and out of the proceeds of said sale, pay and satisfy, &c.," "and if any of the proceeds of said sale should remain after paying said notes and judgments, he is to apply such overplus to the payment of any debt or debts of the grantor, for which and upon which he (Dent Lamar) is security, that he may think proper." This deed is subscribed by the grantor alone, and was duly acknowledged and deposited for record on the day of its date. In connection with the deed, the claimant introduced other proof, tending to show that the cotton levied on was of the

crop conveyed by the deed. The plaintiff in execution moved the court to exclude the deed from the jury, because it was fraudulent on its face, which motion was overruled, and the plaintiff in execution excepted.

In the charge to the jury, the court instructed them, that the plaintiff in execution had no lien by virtue of his execution on the growing crop of Obediah Lamar, except on that portion of it which was gathered before the execution of the mortgage. To which the plaintiff in error also excepted.

The points reserved in the bill of exceptions are assigned for error.

GAYLE & GAYLE, for plaintiffs in error:

1. The deed was fraudulent on its face, and should have been excluded from the jury. Gazzum v. Points, 4 Ala. 374; 10 Ala. 92; 12 Ala. 101: 5 Ala. 324: 7 Ala. 365: 16 Ala. 560; 1 Iredell 498.

2. The charge of the court as to the lien of the execution, was erroneous. 5 Ala. 740, dissenting opinion of Ormond, J., and cases cited on R. H. Smith's brief in that case.

LIGON, J.—Two questions are raised on the record by the assignment of errors: 1. Is an execution in the hands of the sheriff a lien on the ungathered crop of the defendant? 2. Is the deed from Obediah Lamar to Dent Lamar fraudulent on its face, and void as to his creditors?

1. While it may be conceded that an ungathered crop is regarded as the chattel of the person who owns it, and, by the common law, is subject to be levied upon and sold under execution for the payment of his debts; yet the legislature of this State has, by special enactment, exempted such property from levy and sale under execution. Clay's Dig. 210, § 46. This act was construed by this court in the case of Adams v. Tanner & Horton, 5 Ala. 740, and it was there held, that the lien of a *fi. fa.* does not attach until the crop is gathered. We are satisfied with this construction, and are not inclined to disturb it.

2. A deed which postpones a creditor in the collection of his debt, beyond the time of its maturity, is not valid as a conveyance of the property mentioned in it, until it is assent-

ed to by the creditor. Until that time, it is a mere power, and may be revoked by the levy of an execution by the creditor on the property intended to be conveyed by it. Neither will the assent of the creditors to such a deed be presumed. Nelson v. Dunn, 15 Ala. 502; Lockwood v. Nelson, 16 Ala. 294; Smith v. Leavitts, 10 Ala. 93; Graham v. Lockhart, 8 Ala. 9; Elmes v. Sutherland, 7 Ala. 262.

But where the deed is absolute in its terms, and conveys property to the trustee for the benefit of certain specified creditors, who have not executed it, but whose debts are not postponed beyond their maturity, the assent of the creditors will be presumed, and the deed is not a mere power, but will be regarded as a valid and operative conveyance. Kinnard v. Thompson, 12 Ala. 487; Maulden, Montague & Co. v. Armistead, 14 Ala. 702; Lockwood v. Nelson, 16 Ala. 295.

In the deed under consideration, the property is conveyed absolutely to the trustee, for the payment of all the debts enumerated in it, and no condition is imposed prejudicial to the creditors, or restrictive of their rights. Neither is any benefit to the grantor stipulated for by its provisions. The discretion as to the time and manner of selling the crops conveyed, which, by its terms, is given to the trustee, does not affect the *bona fides* of the transaction, or tend to delay the creditors in the collection of the debts secured. Were the trustee to refuse to act promptly or within a reasonable time, they might compel him in equity to do so, or have him displaced, and one appointed who would faithfully execute the trust created by the deed.

We are clear that the deed is not fraudulent on its face, and that there was no lien on the cotton, in favor of the plaintiffs in error, resulting from their execution in the hands of the sheriff, at the time the deed was executed, unless it be on that part, if any, which was gathered at that time.

The ruling of the court below is entirely consistent with these views, and its judgment is consequently affirmed.

PRICE *vs.* SIMMONS, Adm'r.

1. A judgment that has been reversed, is a mere nullity.
2. Where a decree was rendered by the Court of Probate against an administrator in favor of a succeeding administrator *de bonis non*, and was reversed, on writ of error to the Appellate Court, after the money had been collected under execution from one of the administrator's securities, and had been distributed among the legatees, and the security afterwards brought suit against the administrator *de bonis non* to recover the money. *It was held:*
That the administrator, on another settlement in the Court of Probate pending the action in the Circuit Court, was not entitled to a credit for the amount collected on the former decree.

Error to the Court of Probate of Benton.

On the 17th January 1845, a decree was rendered by the Court of Probate of Benton County, against William C. Price, as administrator of William Burns, in favor of James L. Simmons, as administrator *de bonis non* of said Burns, for the sum of $1982 69. An execution against Price having been returned "no property found," another execution was issued against him and his securities, and under this the amount of the decree was collected from Thomas R. Williams, one of the securities; and the money so collected was distributed by said Simmons among the legatees. Afterwards, the decree of the Court of Probate was taken to the Supreme Court by writ of error, and there reversed, (18 Ala. 406:) and Williams then brought suit against Simmons, in the Circuit Court of Tallapoosa, to recover the amount paid by him on the decree.

Pending this suit in the Circuit Court, Price was cited to appear before the Court of Probate, and make another settlement of his administration. He appeared, and insisted that, on the foregoing state of facts, he was entitled to a credit or off-set, for the amount so collected from Williams; but the court again rendered a decree against him for said sum of $1982 69, and this decree is now assigned for error.

The above stated facts are recited in the judgment entry, as having been "agreed and admitted by the said W. C.

Price," and it is also recited therein, that this was "the only testimony given in evidence."

RICE & MORGAN, for plaintiff in error:

1. The question is, can Price, the administrator in chief, show, in defence of the petition of Simmons, administrator *de bonis non*, that Williams, the security of Price, has paid up and discharged all of Price's liabilities to the estate, and that the money has been paid over to the distributees in the course of administration.

A satisfaction by a stranger, is a good satisfaction. Miller v. McLane, 10 Ala. 857.

2. The replication made by Simmons, that Williams has sued him for the money paid on the reversed judgment, is not good: 1. It merely presents the fact that a suit for the money is pending. McLane v. Spence, Adm'r. 11 Ala. 172. 2. The replication is bad for a departure, and is frivolous. Suppose issue had been joined upon it, would the judgment be upon the merits? Suppose the defendant should rejoin, that Simmons was not liable to Williams, having paid out the money without notice; That would bring up a new case and a collateral question. The replication must be bad, because it assumes that Simmons had no right to collect the money from Williams. McLane v. Miller, *supra*.

3. There is no hardship in this case. Simmons could have protected himself by refunding bond. If he chooses to take all the risk of the collection of the money from Williams, and the payment to the distributees, he cannot be heard to say now, that Williams has sued him for the money. That would be to make his rights depend upon the volition of Williams. What if Williams had not sued? Could Simmons say, "Williams ought to sue me and recover this money?" This is the very question presented by the replication set up by Simmons in this case.

4. There is as much hardship on Price as there could be upon Simmons. Suppose this judgment is affirmed, Price must pay it, and Williams has paid it; Price is still liable to Williams for contribution. Price and Williams never could have protected themselves against the conduct of Simmons; he invokes the powers of the court (unlawfully,) to collect

the money, and now he asks Price and Williams to have faith in him, that he will repay the money to Williams. He says, "the reversal of the decree puts the parties in *statu quo*, as to their legal rights, and I will put Williams in *statu quo*, if I should be unable to defeat him, and should have the money to satisfy the judgment when rendered. In the mean time the court will take judicial notice, that I intend to put him in *statu quo*, (when I get able and willing to do so,) and that, therefore, Williams is in *statu quo*."

FALKNER, A. J. WALKER and J. B. MARTIN, *contra:*

1. It is insisted for defendant in error, that the reversal of the judgment or decree entitled Williams to recover the money back, and that plaintiff in error cannot claim the payment as a satisfaction of the demand without the consent of Williams, which consent was not shown. See this case in 18 Ala. 405; Judge of Benton Co. Ct. v. Price, Adm'r. 6 Ala. 36.

2. If Williams has a right of action against Simmons for the money collected on the execution, then Price has no right to claim the payment as a payment made by him, or for his benefit.

3. A security has the right of action against his principal for money paid for him, as security; and until that right of action is extinguished by the principal, by actual payment of his liability to his security, he cannot be heard to set it up.

4. If the payment to Williams is a satisfaction of the demand from Price, then Williams has no right of action against Simmons, and if the court should be of this opinion, we have no objection to a reversal of the decree, and the proper decree being rendered in this court; and in that event, an error which intervened in the Probate Court, prejudicial to the defendant in error, should be corrected, viz: interest should be allowed on the sum due from the 17th day of January, 1845. But if the assent of Williams has not been obtained for this purpose, he not being a party to the record, this cannot be done.

5. When execution issues against Price in this case, and is returned "no property," and an execution then issues against the securities on his official bond, Williams can then set up the former satisfaction to extinguish his liability, provided he

has not in the mean time collected the money back from Simmons.

PHELAN, J.—Wm. C. Price was administrator, with the will annexed, of Wm. Burns. He was succeeded in his administration by James L. Simmons, as administrator *de bonis non*, by whom he was cited before the Orphans' Court of Benton to make final settlement; and upon such final settlement before said Orphans' Court, Price was found to have in his hands, of the funds of the estate, the sum of nineteen hundred and eighty-two dollars and sixty-nine cents, ($1982 $\frac{69}{100}$) after deducting all just credits and his commissions. For this sum, there was a decree rendered against him by the Orphans' Court, in favor of said Simmons, administrator *de bonis non*, in January, 1845. Upon this decree there was an execution issued against Price, which was duly returned "*nulla bona*." An execution then issued against said Price and his securities on his official bond as sheriff, (he had been administrator in virtue of his office as sheriff,) of whom Thomas R. Williams was one, and the amount of the execution was collected out of said Williams, and after being so collected, was paid over by Simmons, the administrator *de bonis non*, to the legatees of the testator, Wm. Burns.

After all this, the decree of the Orphans' Court in favor of Simmons, administrator *de bonis non*, against Price, administrator, was taken, by writ of error, to the Supreme Court, where it was reversed. 13 Ala. 749. Since then, Williams has sued Simmons in the Circuit Court of Tallapoosa, to recover back the money paid by him on the execution which issued against him as a security of Price on the decree of the Orphans' Court of 1845, which has been reversed, and this action was pending at the time of this trial below in the Probate Court.

The foregoing state of facts was shown to exist, upon a new citation issued at the instance of Simmons, administrator *de bonis non*, against Price, as administrator of Burns, to make final settlement, on the 22nd day of August, 1850, and brought to a hearing at the November term of said Probate Court, 1850.

Upon this proof, the Probate Court decreed anew in favor

of Simmons, administrator *de bonis non*, against Price, admintrator, for the sum of $1982 $\frac{62}{100}$, admitted to be due as aforesaid, and for which the former decree, which Williams, as security, paid, and which was afterwards reversed, was originally rendered. This decree is assigned for error.

The plaintiff in error, Price, insisted before the Probate Court, that the payment of the money on the former decree by Williams, and the appropriation of it by Simmons to the payment of the legatees under the will of Burns, ought to be regarded, in law, as a satisfaction of the sum now claimed of him by Simmons.

There is nothing to protect Simmons from a recovery by Williams, in his action in the Circuit Court of Tallapoosa, for the money paid to him by Williams under the decree of the Orphans' Court against Price, which was afterwards reversed. A judgment that has been reversed, is regarded as a nullity. It is the same as if there had been no judgment. Dupuy v. Roebuck, 7 Ala. 484; Simmons v. Price, 18 ib. 405.

If Williams can recover this money back from Simmons, and Price can claim the advantage of the same money in satisfaction of the demand against him, because Simmons has paid the legatees of Burns with it, the result follows, that Simmons is made to pay the legatees out of his own pocket, and Price and Williams go clear of their just liabilities. Such a consequence is too manifestly unjust to be tolerated for a moment, and satisfactorily shows the decision of the court, refusing to allow the same, to be correct.

As long as Williams persisted in his action against Simmons to recover back the money he paid on the decree which was reversed, Simmons should be allowed to pursue afresh his demand against Price in the Probate Court, and that court properly decided to take no notice of the payment of the legatees by Simmons.

There is no error in the decree of the Probate Court, and the same is affirmed.

CHILTON, J., did not sit in this case.

LANKFORD *vs.* KEITH & WEIR, Use, &c.

1. In reviewing the decision of an inferior court upon a question as to the competency of a witness, the Appellate Court will only look to the facts disclosed to that court, and will not consider other facts which were not brought to its view.
2. But when the incompetency of the witness is made to appear, in part by the record or the papers of the cause, and in part by parol proof, the Appellate Court will not infer that the court below looked only to the parol proof, irrespective of the record; especially, where the parol proof points to the particular paper in the cause which shows his interest.
3. An agent who sues out an attachment in the name of his principal, and executes an attachment bond purporting to bind the principal only, to which he signs his principal's name, and his own as agent, is an incompetent witness for the principal in the attachment suit.

Error to the Circuit Court of Benton.

Tried before the Hon. L. P. Walker.

This suit was commenced by attachment, in the name of Keith & Weir for the use of Eliza Jane Tate, against the plaintiff in error. The affidavit for the attachment was made by William M. Weir, as agent for Mrs. Tate; and on the trial, the plaintiff offered said Weir as a witness. The defendant then proved, that the witness was the same person who had acted as plaintiff's agent in suing out the attachment, and that he signed the bond for her as her agent; and on this proof objected to his competency as a witness. The court overruled the objection, and allowed the witness to testify, and the defendant excepted. The bond which is copied into the record, purports on its face to bind Eliza Jane Tate and G. M. Crouch only, but it is signed thus: "Eliza Jane Tate, [seal] Wm. M. Weir, agent, [seal] G. M. Crouch, [seal]."

Parsons & White, for plaintiff in error:

1. The attachment was sued out by Weir, as the agent of the usee, and the bond is signed by him individually, as one of the co-securities. Weir then was incompetent as a witness for the plaintiff, being primarily liable on the attachment bond if the suit failed; and but for his evidence, in proving

a subsequent promise after Lankford's discharge in bankruptcy, the suit would have failed. Shiras v. Morris, 8 Cowen, 60; Emerton v. Andrews, 4 Mass. 653.

2. The interest of Weir being made to appear, otherwise than by his own examination, he is incompetent to prove that he was an agent merely. Dent v. Portwood, 17 Ala. 242; Herndon v. Givens, 19 ib. 313.

J. B. MARTIN, *contra:*

The objection made to the witness was: "that the defendant showed that witness was the same Wm. M. Weir who sued out the attachment in the cause, as the agent of the plaintiff, and that he signed the bond for the usee, as her agent;" no bond is incorporated in the bill of exceptions, or made a part of the record. The bond found in the transcript will not be considered by the court, because: 1. It is in no way made a part of the record, 9 Ala. 450; 2. If it should be held by the court to be a bond which imposed a personal obligation on the witness, then it is manifest that this bond is not the one referred to in the bill of exceptions; 3. The court will presume, that such a bond as is described in the bill of exceptions was executed, in order to render the witness competent; 4. To construe the defendant's objection to apply to this bond, would be to take the plaintiff by surprise: to exclude the witness upon a new and totally different ground, from the one taken in the court below; and one, too, which, had it been taken, might have been obviated by the execution of a new bond.

Does the fact, that the witness was the agent who sued out the attachment, render him an incompetent witness for plaintiff? If so, it must be for the reason, that he would be liable to the defendant for having sued it out wrongfully and maliciously. This is not a sufficient reason for his exclusion; because, not being a party to the attachment suit, the judgment therein recovered could not be given in evidence against him, in a suit by defendant. 1 Phil. Ev. 247; ib. 250; 11 Ala. 607; 14 Johns. 79; 18 ib. 352; 1 Munf. 373. The fact that the judgment was procured upon the testimony of the witness, would exclude it as evidence in a suit against him. 14 Johns. 83; 4 Taunt. 18; 4 Day's R. 431. And our statute

destroys to a great extent the effect of a judgment in an attachment suit, in a suit subsequently brought for damages, by refusing to allow the defendant to controvert the ground on which the attachment was sued out. 16 Ala. 765; 17 ib. 167.

But, should these positions be erroneous, it is then insisted, that, if the witness be at all interested, it is an interest of such an indefinite, uncertain and contingent character, as will not exclude him. 4 Dana, 100; 2 Florida R. 58; ib. 408; 9 Ala. 219; 5 Wend. 55; 1 Johns. 487.

DARGAN, C. J.—It is conceded in the argument, that the witness was in fact interested, being bound on the bond as it appears in the record. But it is insisted, that the bond was not before the court, when the question was made in the court below, and that the question was decided exclusively upon the parol proof, showing that the witness was the plaintiff's agent in suing out the attachment, and that he signed the bond for her as agent; and, looking to this proof alone, that it does not render him incompetent. But, we think, that the question must have been decided by the court below, in view both of the bond and the parol proof that was offered. The bond constituted a part of the record, or of the papers in the cause, and the parol evidence could only have been introduced to show that the witness was the same person who acted as the plaintiff's agent in suing out the attachment, and who signed the bond. We cannot well conceive how the court would have decided the question, without considering the bond, or rather without looking at its legal effect as respects the interest of the witness.

It is true, that in reviewing the decision of the court below, upon a question of the competency of a witness, we ought to look to the facts, as they were disclosed to that court, and should not consider other facts not brought to the view of the court below. But when the incompetency of the witness is made to appear in part by the record, or the papers in the cause, and in part by parol proof, we cannot infer that the court looked to the parol proof alone, irrespective of the record; especially, when the parol proof points to the particular paper in the cause which shows the interest of the wit-

ness. In the case before us, the bond was one of the papers in the cause, and the parol proof showed that the witness, as the agent of the plaintiff, signed it. We cannot think that the court decided the question without considering the bond; consequently, we infer that the court allowed the witness to testify, in view both of the bond and the parol proof connecting the witness with it, and so considered his interest clearly appeared, and the court erred in permitting him to testify.

Let the judgment be reversed, and the cause remanded.

SEALE *vs.* McCLANAHAN, JUDGE, &c.

1. When a party is bound over to appear before the Court of Probate, on the charge of being the father of a bastard child, no further notice to him is required, but the court may investigate the charge and render judgment against him in his absence; his non-appearance furnishes no reason for suspending or thwarting the action of the court.
2. In proceedings under the bastardy act, the Court of Probate has but a limited jurisdiction, to be exercised in a special manner; and this jurisdiction attaches when a party is bound to appear before it, on the charge of being the father of a bastard child, at its session next after the bond is taken; but it has no power to take cognizance and proceed *ex parte* with a cause brought before it in a different manner.
3. If the bond does not conform to the statute, in requiring the defendant to appear at "*the next term*" after it is taken, it is void, and the proceedings dependent upon it are *coram non judice*.
4. A judgment rendered by the Court of Probate under the bastardy act, though not in favor of any person by name as plaintiff, is nevertheless sufficient, since the statute points out with certainty who is the plaintiff.

ERROR to the Court of Probate of Shelby.

This was a proceeding against the plaintiff in error, as the putative father of a bastard child.

It appears that the mother, Lamantha Music, went before a justice of the peace for Shelby county, on the 7th day of May, 1850, and made oath that she was then with child; that it was likely to be born a bastard, and that James Seale, the present plaintiff in error, was the father of said child. There-

upon, the said justice issued his warrant, caused the said Seale to be apprehended and brought before him, who entered into bond in the penalty of five hundred dollars, payable to Henry W. Collier, Governor, &c., with Jackson Porter and Willaby Seale, his securities, conditioned "that if the said Seale do and shall appear at the next Probate Court, to be holden for Shelby county on the second Monday in July next, and abide and perform such order and decree as shall be made in the premises, pursuant to the act in such cases made and provided, and shall in the mean time be of good behavior, then the obligation to be void." &c.

At the July term of the Probate Court, the cause was continued, it is said, "on the application of the plaintiff."

Afterwards, at the August term, 1850, of the Probate Court, Seale failing to appear, the court caused an issue to be made up as to whether he was the real father of the child, and having examined the mother touching its paternity, proceeded to adjudge that Seale was the father, and that he should annually, on the 12th day of August of each year, for the term of ten years, pay or cause to be paid into the Probate Court for Shelby county, the sum of fifty dollars, for the support, maintenance and education of said bastard child, and that he should enter into bond with security, in the penal sum of one thousand dollars for the faithful performance of the said order: also, that he pay the cost, for which an execution was required to issue, and that an attachment issue to compel him to comply with the requisitions of the judgment.

On the 24th August, 1850, the writ of attachment was accordingly issued, and Seale having been arrested, petitioned for a *habeas corpus* to obtain his discharge from custody. The court, upon the trial of the *habeas corpus*, ordered the sheriff to retain him in custody, until he should give bond as required by the previous order. Thereupon, the said Seale entered into bond and security, which was approved by the court.

It is here assigned for error, that the Probate Court improperly rendered judgment against Seale, without having him before the court; that the judgment itself is informal and in favor of no one; and that there was error in issuing an attachment without first citing the party to show cause against its issue.

L. E. PARSONS, for plaintiff in error.

RICE & MORGAN, *contra.*

CHILTON, J.—In this case, the only point of difficulty arises upon the construction of the second section of the bastardy act, found in Clay's Digest 134, which requires the justice of the peace, before whom complaint may be made that any one is the father of a bastard child by a single woman, on sufficient cause appearing, "to bind such person, so accused, in bond, with good and sufficient security, to be and appear before the next County Court to be holden for said county, and in the mean time to be of good behavior." The third section declares, that the County Court aforesaid, at its next term, shall have full and complete cognizance and jurisdiction of said charge of bastardy. By the act approved 13th February, 1850, Pamphlet Acts, p. 37, it was provided, that proceedings in cases of bastardy, which are required to be returned to the County Court, shall, after the time named in the first section of this act, (viz: the first Monday in May, 1850,) be returned to the Court of Probate, in which the like proceedings shall be had as are required by the existing laws of the County Court: and the said Courts of Probate shall have and exercise full jurisdiction of, and perform all the duties in cases of bastardy now exercised and performed by the County Courts.

By the thirteenth section of the act establishing Courts of Probate, passed at the same session, (Acts of 1850, p. 27,) it was enacted, "that said judges of probate shall each hold, at the court house of their respective counties, a regular term of his court, to commence on the second Monday in each month, and may have special or adjourned terms, when required for any special business, at any time."

Under these statutes, we think it clear, that the bond taken before the justice of the peace in this case, and which the act of 1811 required should provide for the appearance of the putative father at "the then next term of the County Court," should have been made returnable to the term of the Probate Court next after it was executed, which must have intervened before the court in July. Had the bond been thus returned and conditioned, the next court, whether in May or June, as

the case might be, would, in the language of the act, have had "full and complete cognizance and jurisdiction of the charge."

We do not think that in such case any further notice to the party would have been required. Had he bound himself to appear at a court to which he might lawfully have been required to appear, his non-attendance would have furnished no reason for suspending, much less thwarting the action of the court.

But a limited jurisdiction is conferred upon the Probate Court in this matter, to be exercised in a special manner. This jurisdiction attaches when a party is bound to appear before it, upon a charge of being the father of a bastard child, at its session next after the bond is taken, and no statute confers on it power to take cognizance, and proceed *ex parte* with a cause brought before it in a different manner. If the justice could skip over two courts, why may he not two years? Where will be the point beyond which he may not require the party to appear? The rule and the only guide is furnished by the statute. If the bond does not conform to that, it is void, and the proceedings dependent upon it are *coram non judice.*

As respects the form of the judgment, it has been several times decided by this court, that it is sufficient, since the statute points out with unerring certainty who is the plaintiff. Trawick v. Davis, 4 Ala. 328; Austin v. Pickett, 9 ib. 102; Yarborough v. Judge of Shelby county, 15 ib. 556.

The other questions raised will hardly come up in the further prosecution of this party.

The judgment must be reversed, and the proceedings vacated. The cause will not be remanded, since it was never properly in the court below. The subsequent steps which would be required, would amount to the institution of new proceedings.

CUTHBERT, ADM'R. *vs.* HUGGINS ET AL.

1. The securities of a sheriff are not responsible on their bond for money received by him on an execution which came to his hands after the expiration of his term of office and before his successor was qualified, although during the interval he was sheriff *de facto*.
2. The fact that the execution was issued on a forfeited forth-coming bond, which had been taken under a levy made on a former execution, which had come to the sheriff's hands before the expiration of his term of office, does not affect the case.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. L. GIBBONS.

George Huggins was duly elected sheriff of Mobile County on the first Monday in August, 1846. On the 11th day of that month he was duly qualified, and entered upon the discharge of the duties of his office, having executed his official bond, with the defendants in error as his securities. On the 16th of August, 1849, a writ of *fieri facias*, on a forfeited forth-coming bond, in favor of the plaintiff in error against one Oswald, came into his hands, and he received the money thereon on the 22nd August, 1849, which he failed to pay over on demand.

On the 22nd January, 1852, the plaintiff in error caused a notice of motion to be duly served on the securities, setting forth that he would move for judgment against them, for the default of the sheriff, for the sum collected and retained by him, with interest, and damages, at the rate of five per cent. per month, from the time the money was demanded.

To this notice, the defendants pleaded, that Huggins received the *fi. fa.*, on which the money was made, after the expiration of his constitutional term of service. To this plea the plaintiff replied, that when the execution was issued and delivered to Huggins, and also when the money was received by him, his successor in office had not entered upon the discharge of his duties as sheriff, and that Huggins continued to act as such. To this replication the defendants demurred, and their demurrer was sustained by the court. From the judgment of the court on the demurrer, the plaintiff sued out

a writ of error to this court, and that judgment is here assigned for error.

CUTHBERT, for plaintiff in error.

BOYLES, *contra.*

LIGON, J.—By the twenty-fourth section of the third article of the Constitution of this State, the term of the office of sheriff is limited to three years, and he is rendered ineligible to the immediately succeeding term, and disqualified from acting as the deputy of his successor. It was evidently designed to separate him entirely from the duties of the office at the expiration of his own term.

It has been held, however, that until his successor is qualified, he is sheriff *de facto*, with respect to process coming into his hands after the legal expiration of his own term, and sheriff *de jure* in respect to writs of execution which came to his hands, and were levied, before his term expired. Bondurant v. Buford, 1 Ala. 359; 7 ib. 535; 7 Humph. 447.

In the present case, the term of Huggins had expired before the writ of *fi. fa.* came into his hands, so that he received it as sheriff *de facto*, and not *de jure*. This view of the case is in no wise affected by the fact, that this was an execution on a forfeited forth-coming bond, which had been taken under a levy made by Huggins on a former execution on the same judgment. On this *fi. fa.* there are new parties defendant, which were not in the former judgment, and the writ itself may be regarded as original, so far as the office judgment on the forth-coming bond is concerned.

A sheriff *de facto* is the creature of necessity: and is an officer without sureties. For certain purposes, and as to certain persons, his acts will be upheld; but his defaults cannot be visited upon those who were his sureties for the regular term for which he was elected sheriff, and whose liability can not be extended by any just interpretation of the condition of their bond, to acts done after that term has expired, unless they concern such writs of *fi. fa.* as he had levied within the term.

There is no error in the record, and the judgment must be affirmed.

CROFT *vs.* FERRELL ET AL.

1. Where *ex parte* proceedings are instituted in the Court of Probate against an executor, administrator or guardian, who has removed beyond the jurisdiction of the court which granted him letters without settling his accounts, although it is necessary that the record should show the facts which invest the court with authority to state the account, yet it is immaterial whether the facts are proved before or after publication; from the time of the application, until the action of the court in stating the account, the proceedings are to be regarded as *in fieri*, and the authority on which the final action is based may be proved at any time before such action is had.
2. Where the account is stated and reported for allowance at the next term of the court, at which term, on account of there being no judge qualified, the proceedings are irregularly continued to the next term, the appearance of the guardian to the motion against him for the allowance of the account, and his failure to object to it on account of such irregular continuance, is a waiver of it, and places him rightly in court, even if the irregular continuance amounted to a discontinuance of the proceedings.
3. To authorize an appellate court to revise the decision of an inferior tribunal in relation to the admission or rejection of evidence, the bill of exceptions must show that such decision was excepted to during the trial of the case.
4. Where the bill of exceptions, after reciting the ruling of the court on another point and the defendant's exception thereto, stated that the defendant then offered certain evidence, and concluded thus: "The court refused to receive the testimony as offered by defendant. The defendant prays the court to sign and seal this, his bill of exceptions to the ruling of the court, which the court now signs," &c. *It was held*:

   That the bill of exceptions did not show that any exception was taken during the trial of the cause to the ruling of the court in excluding the testimony; and that the words of exception used in the conclusion of the bill must be construed to refer to the previous ruling of the court, to which the body of the bill showed that exception was taken.

ERROR to the Court of Probate of Chambers.

On the 13th of August, 1849, the defendants in error, who are the heirs at law of John Ferrell, deceased, moved the Court of Probate to state an account against the plaintiff in error, who was their guardian. The decree stating the account then proceeds as follows: "And it appearing to the court, that, at a regular term of the Orphans' Court of said county, the said heirs at law of the said John Ferrell, deceased, made application in writing for a notice by advertisement to be given to the said Edward Croft, guardian as aforesaid, by publication

in the "Chambers Herald," a weekly newspaper published in said county, requiring said Croft, guardian as aforesaid, to file his accounts and vouchers for a settlement of said estate at this term of the court; and it appearing to the court, that the said Croft, guardian as aforesaid, before the filing of said notice, had removed beyond the jurisdiction of this court, which granted said letters of guardianship to him, and that notice was given to said Croft, guardian as aforesaid, by advertisement made in said "Chambers Herald" for more than three months before this term of the court, requiring him to file his accounts and vouchers for a settlement; and it appearing to the court, that the petitioners for said notice are the heirs at law of said John Ferrell, deceased, and that they are all now of the age of twenty-one years, and that the said Croft was appointed guardian by the judge of this court, and having failed to file his accounts and vouchers for a settlement of said estate, the judge of this court proceeded to state an account against him," &c.

The decree then sets out the account as stated, and makes the usual order of publication, requiring said guardian to appear on the second Monday in October, 1849, and file his accounts and vouchers for a settlement, and notifying him, that, if he made default, the account as stated would be reported for allowance.

The record shows, that, at the said October term of the court, the proceedings were "continued until the second Monday in November next, there being no judge qualified." At the November term, the defendants in error moved the court to report for allowance the account as stated in the decree of August 13; but the plaintiff in error appeared by his attorney, and contended, that the record showed "that the said judge had no jurisdiction or right to render said decree or judgment upon said account so stated by him. In this the court overruled the defendant, and he excepted."

"The defendant then moved the court to open said decree or judgment upon the account so stated, because the facts set out in said decree were not true; and, in support of his motion, offered to prove that no such publication as is stated in the decree was in fact made." * * * "The court would not permit the defendant to make any of the above proof, and

ruled, that the decree or judgment so made was conclusive of every fact contained in the same, and that the record could not be contradicted by such proof. The defendant then offered to prove that there was no publication in any paper, except the publication made in the "Chambers Herald" in the fall of 1847. The court refused to receive the testimony as offered by the defendant. The defendant prays the court to sign and seal this, his bill of exceptions to the ruling of the court, which the court now signed and sealed," &c.

The errors assigned are:

1. The court below erred in rendering the final decree shown in the record;

2. The court erred in not entering judgment pronouncing the proceedings discontinued;

3. The court erred as shown in the bill of exceptions.

RICE and ALLISON, for plaintiff in error:

1. The judge of the Orphans' Court, in 1849, had no power or jurisdiction to cause notice to be given by publication in a newspaper to a guardian, until it was proved to him, or made to appear to him in some manner, not only that the guardian had removed beyond the jurisdiction of the court, but that he had done so "without having settled his accounts as such guardian." Although it might appear that the guardian had removed out of the State, still, if he had settled his accounts before such removal, the judge had no jurisdiction to order such publication in a newspaper. But before the judge could acquire, or possess or exercise any such power, it was essential that the record should show, that it appeared to the judge that the guardian had removed "without having settled his accounts as such guardian." Clay's Dig. 230, § 47; 3 Phil. on Ev. 1002, citing Ladbroke v. James, Willes, 199; Allison v. Hampton, 11 Hump. 71; Small v. Pennell, 31 Maine, 267; Denning v. Corwin, 11 Wend. 651.

2. When the order for such publication does not show that the guardian has removed "without having settled his accounts as such guardian," an appellate court cannot intend that he had not settled his accounts, and that it did appear to the court below that he had not settled his accounts. If it be a fact that he had not settled his accounts before he re-

moved, it is a jurisdictional fact, and cannot be supplied by intendment. The proceedings of the court subsequent to the order of publication, cannot be looked to for the purpose of aiding or supplying this defect, for if the power to give the notice is not shown by the record to have existed at the time the publication was ordered, all the subsequent proceedings are irregular and void. Harvey v. Huggins, 2 Bailey, 252; Bishop's Heirs v. Hampton, 15 Ala. Whenever the law authorizes the constructive notice, great strictness is required, and it must be shown to have been given precisely as the law required.

3. The non-existence of a jurisdictional fact may be shown by parol evidence, even in opposition to the recital of such fact on the record. 3 Phil. on Ev. 800–801; Harvey v. Huggins, 2 Bailey, 252, 267.

It was clearly erroneous to refuse to hear the evidence offered by plaintiff in error, in the court below. Especially was it erroneous to refuse to allow plaintiff in error to prove "that there was no publication in any paper, or otherwise, except the publication made in the Chambers Herald, in the fall of 1847." The publication in the Chambers Herald, in the fall of 1847, was made long before this case was reversed in the Supreme Court, and cannot, therefore, make valid any decree rendered since such reversal. Terrell v. Croft, 15 Ala. 652.

The plaintiff in error moved the court to open the account stated by a former judge, upon grounds stated on page 10 of the record, and "offered to prove by the editor and publisher of said paper, that no such publication was made in said paper, requiring said Croft, guardian, to appear before said Orphans' Court, at the August term, 1849, as set out in said decree." This proof was erroneously rejected.

4. The Orphans' Court had no terms of court fixed by law, except the semi-annual terms of the County Court. Westmoreland v. Hale, 11 Ala. 122. Therefore, whenever notice or process was made returnable to that court on a return day fixed by the judge, and on such return day there was "no judge qualified," (as in this case,) the proceeding was thereby discontinued. There being no judge, there could not be a continuance by the clerk, who is not a judicial, but a mere

ministerial officer; and the law itself does not continue such summary proceeding in such a court: a court whose terms were not fixed by the law. Armstrong v. Robertson, 2 Ala. 164; Drinkard v. The State, 20 Ala.

Where the law itself fixes the terms of a court, and there is no judge at a particular term, it may be that the law itself will continue cases pending to the next succeeding term fixed by the law, of which term so fixed the law charges parties with notice. But where the law itself does not fix the terms of the court, and there is no judge on the return day of notice or publication for a summary proceeding, the law cannot and does not continue such summary proceeding. There is no day or term to which the law could continue it; and a continuance by the law would be indefinite and uncertain, and to a period of which the parties could not be charged with notice. The proceeding is thereby discontinued, and must be commenced *de novo*, and notice given.

No counsel for defendants in error.

GOLDTHWAITE, J.—From an examination of the bill of exceptions in this case it appears, that no exception was taken to the ruling of the court below, except upon the single point as to the question of jurisdiction, arising upon the decree rendered on the 13th of August, 1849.

The act of 1843 provides, that "whenever any person to whom letters testamentary, of administration, or guardianship shall have been granted by any Orphans' Court of this State, shall have removed beyond the jurisdiction of the court granting said letters, without having settled his accounts as such executor, administrator or guardian, the judge of said court may, upon the application of any person interested, cause notice to be given, by advertisement in some newspaper published in this State, requiring said executor, administrator or guardian to file his accounts and vouchers for settlement, at a regular term of said court to be holden not less than three months from the date of such notice; and if the said executor, administrator or guardian shall fail to appear and file his accounts and vouchers for settlement, it shall be the duty of the judge of said court, to state an account against

said executor, administrator or guardian, charging him with such amounts as shall appear, upon the best information, to have come to his hands, as such executor, administrator or guardian, and proceed to settle and decree upon the same, as is now required by law." Clay's Dig. 230, § 47.

The only object of the notice required by the statute, is, to bring the executor, administrator or guardian, who had removed beyond the jurisdiction of the court which granted the letters without settling his accounts, before the court; and although it is necessary that the record should show the facts which invested the court with the authority to state the account, we regard it as wholly immaterial whether the existence of those facts was proved before or after the publication. From the time of the application, until the action of the court in stating the account, the proceedings are to be regarded as *in fieri*, and the authority on which the final action is based may be proved at any time before such action is had. In the present case, the record shows that, at the time when the order for publication was made, the guardian had removed beyond the jurisdiction of the court which granted the letters of guardianship; and in another part of the record, it appears, that he had not filed his accounts and vouchers for a settlement. The principal act of the court to which the statute we have cited refers, is, the stating of the account, with the view to its future allowance, and all the requisites upon which the jurisdiction of the court depends, or its authority to do this act rests, appear from the record to have been established by the evidence before its performance; and this being the case, the jurisdiction of the court in stating the account was complete.

2. The decree, after stating the account, directs publication to be made, requiring the plaintiff in error to appear at a court to be held on the second Monday in October; at which day, there being no judge qualified, it was continued until the second Monday in November next. Conceding that this entry was void, as not being the act of the court, and that a discontinuance was the result of the failure to continue the proceedings over to another term; yet we think that the appearance of the plaintiff in error, on the second Monday in November, 1849, to the motion against him for the allow-

ance of the account on that day, and his failure to object to the motion on that ground, operated as a waiver of the discontinuance, and placed him rightly in court. Wheeler v. Bullard, 6 Por. 352.

The refusal of the court to allow the evidence offered, cannot be considered, as it does not appear from the bill of exceptions that it was excepted to.

The judgment is affirmed.

NOTE.—The plaintiff in error having petitioned for a rehearing in this case, the following opinion was afterwards delivered:

PER CURIAM.—In this case, an application is made for a re-hearing, on the ground that this court erred in the conclusion to which it arrived, that the decision of the court below rejecting the evidence offered by the plaintiff in error, for the purpose of proving that the recitals of facts in the decree rendered on the 13th of August, 1849, were untrue, was not excepted to, so as to authorize its consideration by this court.

The rule is, that, to authorize an appellate court to revise the decision of an inferior tribunal in relation to the admission or rejection of evidence, the bill of exceptions must show that such decision was excepted to during the trial of the case. Walton v. The United States, 9 Wheat. 651. The bill of exceptions in the present case shows, that the objection made by the plaintiff in error, which has been already considered by the court, was overruled and an exception taken thereto. This is recited in the body of the bill, and of course is to be considered as a statement of the facts as they occurred on the trial. It then continues thus; "The defendant then moved the court to open said decree or judgment upon the account as stated, because the facts set out in said decree were not true; and, in support of his motion, offered to prove, that no such publication as is stated in the decree was in fact made," and several other facts, all conducing to establish that the recitals in the decree were untrue. The bill of exceptions then states, that "the court would not permit the defendant to make any of the above proof, and ruled, that the decree or judgment so made was conclusive of every fact contained in the same, and that the record could not be

contradicted by such proof. Defendant then offered to prove, that there was no publication in any paper, except the publication made in the "Chambers Herald" in the fall of 1847. The court refused to receive the testimony as offered by the defendant. The defendant prays the court to sign and seal this, his bill of exceptions to the ruling of the court, which the court now signed and sealed," &c.

It will be remarked, that there was one point decided against the plaintiff in error which is shown to have been excepted to, as is to be inferred from the language of the bill of exceptions, at the time the decision was made; and the words, "to the ruling of the court," in the prayer of the bill, we think, refer to the ruling of the court which is shown in the body of the bill to have been excepted to. The prayer of the defendant below, "that the court sign and seal this, his bill of exceptions," &c., must be referred to the act which he asks to be done, which is the signing and sealing of the bill; and although it might show that the party excepted to the ruling of the court at the time it was presented, it does not, of itself, and in the absence of any recital to that effect in the body of the bill, show that the exception was taken during the trial. The rule is, that writings of this character are to be construed most strongly against the party taking them, (Patton v. Hayter, 15 Ala. 18); and as the act of 1844, by clear implication, authorizes bills of exceptions to be taken at any time during the term, (Acts 1844–5, page 5,) and in the great majority of cases they are not presented until the trial is over, we cannot, in the present case, presume that the contrary practice was pursued, and that it was presented during the trial.

But we think that the words which are principally relied on by the counsel for the plaintiff in error, "to the ruling of the court," are superfluous where they are found in the prayer of the bill. All bills of exception are to the ruling of the court, and the insertion of these words in the place where they are found adds nothing to the force and effect of what precedes them, and does not in any wise change the construction of the words previously used.

The application must be denied.

WILSON *vs.* MARIA.

1. The answer of a party to interrogatories filed to him under the statute stands upon precisely the same ground as an answer to a bill in chancery for a discovery; if the opposite party introduces them, he admits that the respondent is worthy of credit, and cannot impeach him.
2. But using the answer of a party does not make it conclusive evidence; it is to be treated like the testimony of any other witness, and is to prevail when it is not outweighed, in whole or in part, by other testimony; and, although a party will not be allowed to impeach the *general reputation* of his witness for truth, yet he will not be precluded from proving the truth of any *particular fact in direct contradiction* of what the witness may have testified; and this, not only when it appears that he was innocently mistaken, but even when the evidence may collaterally have the effect of showing that he was generally unworthy of belief.
3. In assumpsit on a lost note, defendant, in answer to interrogatories filed by plaintiff, admitted the execution of the note, and stated, that it was paid soon afterwards, and was then destroyed by plaintiff. Plaintiff read the answer at the trial, and then offered a witness to prove, that he had seen the note after the day on which it was alleged by defendant to have been destroyed. *Held*.

That the evidence was admissible; and this, although plaintiff knew what his witness would testify, before he filed interrogatories to defendant.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. L. GIBBONS.

JOHN A. CUTHBERT, for plaintiff in error:

1. The plaintiff does not make the defendant his witness, by filing interrogatories to him under the statute. He does not represent him as worthy of belief, but only hopes that, notwithstanding his interest, the truth may be extracted from him.

2. But even if defendant is to be regarded as plaintiff's witness, still the testimony of Moulton was improperly rejected. The rule is, that a party cannot impeach his own witness, by general testimony representing him as unworthy of belief. Without violating this rule, the party has a right to prove, by a second witness, a state of facts different from, and contradictory to the testimony of the first. Starkie's Evidence, Part 2, 147; 1 Phillips on Evidence 232; 5 Wend.

305; 4 Barn. & Adol. 193. Moulton was not asked a single question touching the character or general reputation of the defendant, but was only offered to prove a particular fact inconsistent with one of defendant's statements.

3. The second reason assigned for excluding Moulton's testimony, seems to be founded in the notion, that a party has no right to a discovery from his antagonist when he has any other proof. If this were correct, it might afford ground for refusing or withdrawing the discovery, but not for excluding the other evidence. But the position itself is incorrect; a party is entitled to a discovery, either because he has no other proof, or in aid of other proof. 2 Story's Equity 942; 2 Barb. Chan. Pr. 102.

PERCY WALKER, *contra:*

The statute providing for filing interrogatories to parties to an action at law, evidently contemplates those cases in which the facts inquired of can be proven by no other witness. This is apparent from the language of the statute itself, and that of the affidavit required by it. The party's answers to the interrogatories must control the case. There is no analogy between this proceeding and the answer to a bill in chancery. In the one case, the party makes his adversary a witness, and of course endorses him as such; in the other, he is not estopped by the answer.

The case falls under the general rule, that a party cannot impeach or discredit his own witness. Defendant was asked, what had become of the note; he answered, that it had been paid and destroyed. This answer was pertinent, was responsive to the interrogatory, and disposed of the case. The testimony of Moulton directly impeached this answer.

The bill of exceptions shows, that the plaintiff knew what Moulton would swear, before he filed the interrogatories; and if this be true, there was no warrant in the first instance for an appeal to the conscience of the defendant.

It is contended, that the witness was not offered to impeach the defendant, but to disprove a fact. This view is not sustained by the record. The allegation of the payment and destruction of the note is denied by the witness. What is the effect of this denial, but to discredit the defendant?

PHELAN, J.—This was a suit brought by Thomas Wilson against Joseph M. Maria, on a lost note.

Wilson filed interrogatories under the statute to the defendant, and offered the answers as evidence on the trial.

In answer to one of the interrogatories, Maria admitted that he had made the note set forth in plaintiff's declaration; and in answer to another stated, that he had paid it fifteen or twenty days after it was made to the plaintiff, at his own house, and that the plaintiff then destroyed it, remarking at the time "that all was square."

Plaintiff also introduced one Moulton as a witness, to prove "that the note was in existence at a period long after the time at which the defendant in his answer aforesaid stated that it had been paid and destroyed."

The defendant objected to such proof, on the ground that plaintiff had made the defendant his witness, and could not be allowed to discredit him; and, also, because, as appeared from the statement of the witness, plaintiff knew what he would depose to before interrogatories were submitted to the defendant. The court excluded the testimony of Moulton.

The answers of a party to interrogatories filed under the statute, stand upon the same ground as an answer in chancery to a bill for discovery. The language of the statute is, that they "shall be evidence at the trial of the cause in the same manner, and to the same purpose and extent, and upon the same condition in all respects, as if they had been procured upon a bill in chancery for discovery, but no further or otherwise." (Clay's Digest, 341, § 160.) It is at the option of the party, whether he will introduce the answer in chancery of the other party or not. If he does introduce it, he admits that it is worthy of credit. 2 Story's Eq. § 1528. The same rule must then prevail in respect to answers to interrogatories. The party who introduces them admits that the respondent is worthy of credit, and cannot impeach him.

But using the answer of the party does not make that conclusive evidence. It is to be treated like the testimony of any other witness, and is to prevail when it is not outweighed by other testimony, in whole or in part.

And although a party will not be allowed to impeach the general reputation of his witness for truth, yet he will not be

precluded from proving the truth of any particular fact in direct contradiction of what another of his witnesses may have testified; and this, not only when it appears that the former was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief. 1 Greenleaf, § 443; 2 Phillips Ev. 447.

The testimony of Moulton was relevant to the issue. It went to prove the existence of the lost note, and gave a particular time at which the witness saw it. Suppose that plaintiff had introduced Moulton's testimony first, might not the defendant have objected with equal reason against the introduction of his own answers, upon the ground that it was an attempt upon the part of plaintiff to impeach Moulton's testimony? One fact to be proved by the plaintiff is, the existence at some time before suit brought of the note, which is the foundation of the action. Moulton testifies to its existence at a particular time. The defendant, in his answer, testifies that it had no existence at that time, or rather, that it had been destroyed before that time. Here is a direct contradiction between these witnesses as to the truth of a particular fact, but neither can be rejected on the ground that he will impeach the other. The jury will have to decide upon the weight of the proof, and whether they may impute the contradiction to mistake or fraud, on one side, or on the other, the testimony of both is competent, and should be received.

How the fact, that Wilson knew what Moulton would prove before he put interrogatories to the defendant, can add any force to the objection to admitting Moulton's testimony, I do not very readily comprehend. It seems to be predicated on the idea, that if he knew that Moulton would contradict the defendant in a certain particular, and then introduced the answers of the defendant, and afterwards the testimony of Moulton, that, therefore, it is to be conclusively held, that he intended to impeach the general credibility of the defendant, which he could not do as being his own witness.

This idea loses sight of the sound distinction, that a man may contradict his own witness, and that, too, although the incidental effect of such contradiction be to impair his credi-

bility, when he cannot directly impeach that credibility. In the one case, you assail directly the personal character of the witness; in the other, you assail directly only the correspondence of his statements with the real facts of the case. A witness may be honest, and yet not state the facts truly; and the jury must judge whether his deviation proceeds from mistake or fraud. If the former, they may take part of what he says, and reject part; if the latter, they must reject the whole.

The court erred in rejecting the testimony of Moulton. Let the judgment be reversed, and the cause remanded.

KING ET AL. *vs.* COLLINS, ADM'R.

1. A notice of an intended *annual* or *partial* settlement will not authorize the rendition of a *final* decree.
2. When an infant is interested in the settlement of an estate before the Court of Probate, it is the duty of the court to appoint a guardian *ad litem* for her, although she may have a guardian of her person and property regularly appointed, who was notified of the settlement, and failed to attend. (Overruling Parks v. Stonum, 8 Ala. 755.)
3. The rules of practice which obtain in the Court of Chancery should be applied to the practice of the Court of Probate when they can be made to apply, in those cases where no rule of practice can be drawn from the statutes of this State or from the Ecclesiastical Courts of England.
4. Whether an executor or administrator in chief who has settled with the administrator *de bonis non*, may apply to the Court of Probate for a discharge from liability to the estate, *quaere?* But conceding that he may, he should give notice of his intended application, produce his receipt showing the settlement, and move for a discharge; the court cannot, *ex mero motu*, order his discharge, upon the mere representation of the administrator *de bonis non*, upon his final settlement, that he has settled in full with the executor or administrator in chief.

ERROR to the Court of Probate of St. Clair.

John Collins, administrator *de bonis non* with the will annexed of Joel Chandler, deceased, appeared before the Court of Probate of St. Clair county, on the second Monday in August, 1850, and filed his accounts and vouchers for a settlement of said estate, so far as the same had been adminis-

tered by him; whereupon the accounts and vouchers were examined, audited, and reported for allowance at a special term of said court, to be held on the fourth Monday in September then next following; and it was ordered, "that the said fourth Monday in September be set for the settlement of said estate, so far as the same had been administered, and that the account of the administrator as stated be then allowed, as upon partial settlement, unless proper objections thereto be then made; and that notice thereof be posted up for forty days before said fourth Monday in September, at the court house door and three other public places in said county, that all persons interested may then and there appear, and contest the same, if they think proper."

On the day appointed, the administrator appeared, and reported to the court, that he had made a full and final settlement of the estate with the several distributees, and had taken their receipts for the same, except that of William C. Mynott, guardian of Elizabeth A. King, a minor; and he produced the several receipts. He also reported, that he had made a final settlement with James Hampton, one of the executors of the testator's will, and presented to the court the accounts as made out and settled between him and Hampton. He further reported, that all the legacies given by the will had been paid, except one given to Ignatius Chandler, of a horse, saddle and bridle, to be paid when he should attain the age of twenty-one years. He further reported, that he had in his hands, as would appear from his accounts, the sum of $1245,07, which belonged to Elizabeth A. King. Thereupon the court proceeded to make a settlement, and rendered a decree as follows:

"This day having been set apart by a previous order of this court, made at a regular term thereof holden on the second Monday in August, 1850, for a final settlement of the accounts of John Collins, administrator *de bonis non*, with the will annexed of Joel Chandler, deceased; and notice of said settlement having been given by publication at the court house door and three other public places in the county (all the parties in interest being resident citizens of this State) for more than forty days previous to said settlement; came John Collins, and presented his accounts for allowance. Thereupon

came James Hampton, &c.," naming all of the distributees, except Elizabeth A. King; "and it appearing to the satisfaction of the court, that William C. Mynott is guardian for Elizabeth A. King, a minor, and that he had due and lawful notice of this settlement; and no objection or exception having been made by any of the parties, to the said accounts of the administrator: It is ordered by the court, that said accounts and vouchers be allowed, and that the same be entered of record, as a full and final settlement of the administration of said Collins on the estate of said Joel Chandler, up to September 23, 1850."

The decree then recites, that it appeared from the account filed by the administrator, and from the several receipts presented by him, that all of the legatees and distributees, except Elizabeth A. King, had been fully paid, and that the said administrator had in his hands the sum of $1245,07 belonging to the said Elizabeth, which sum he was ordered to pay over to her guardian.

It was further ordered, "that said James Hampton, former executor of said estate, be fully discharged from all liability to the estate on account of his said executorship;" and that John Collins be continued in the administration of said estate, and that he retain, out of any moneys that might thereafter come to his hands, the sum of one hundred dollars subject to the order of the court, for the purpose of paying the legacy due to Ignatius Chandler.

Upon this decree Elizabeth A. King, by her guardian, sues out a writ of error, in the name of all the distributees and legatees, and assigns the following errors, among others:

1. The court erred, in proceeding to a final settlement upon proof that notice of a partial settlement had been given; the application having been made for a partial settlement only:

2. In not appointing a guardian *ad litem* for Elizabeth A. King, it appearing that she was a minor;

3. In rendering a decree in favor of William C. Mynott, as guardian of said Elizabeth;

4. In ordering that James Hampton, the former executor, be discharged from all liability to the estate; no notice having been given of any such proceeding, and the same not

being necessary to the settlement then pending before the court.

WHITE & PARSONS, for plaintiffs in error:

1. It was erroneous to render a final decree upon publication for a partial settlement. The effect of a partial settlement is, to render the accounts and vouchers thus presented *prima facie* evidence only for the administrator, upon a final settlement, and then they may be surcharged or falsified. The serious consequences which might result from being entrapped into a final settlement, when notice is given of a partial one only, are obvious to every legal mind.

2. The court should have appointed a guardian *ad litem* for Elizabeth A. King, who is shown to be a minor. The record is silent, as to what evidence was before the court to show that W. C. Mynott was her guardian; and this being a court of limited jurisdiction, nothing can be presumed in favor of the record. Commissioners of Talladega v. Thompson, 18 Ala. The record must always show, when there are minors, *that they were represented before the court*, either by a guardian or a guardian *ad litem*. Devor's Heirs v. Devor's Admrs., decided at June term, 1851; Black's Heirs v. Black's Admrs., January term, 1852. If it were admitted that Mynott was the regular guardian, yet, as he failed to attend and represent the infant, the court should have appointed a guardian *ad litem*.

3. The decree should have been in the name of Elizabeth A. King, by her guardian, and not in the name of the guardian.

4. The decree does not show the amount of the distributive shares which the others received; whether the sum in the hands of the administrator ordered to be paid to the guardian of said Elizabeth, is equal to the shares which the others received, is left to conjecture. A final decree should ascertain the amount to be divided, the number of persons who are to share it, and in what portions.

5. The court erred in ordering the discharge of James Hampton from all liability to the estate. The law does not authorize it in this proceeding, and no notice was given of it.

RICE & MORGAN, for defendant in error:

The errors are assigned for Elizabeth A. King alone, and the writ of error is prosecuted by Mynott, as guardian. Elizabeth A. King cannot complain that the judgment is erroneous, upon this writ of error.

1. The decree was not in legal effect final, although the decree denominates it final up to 23d September, 1850. The subsequent part of the decree re-commits the estate to Collins, the administrator.

2. If the decree is not final, no writ of error will lie from it. 8 Porter 554.

3. The court could not appoint a guardian *ad litem* for the infant, when it appeared that she had a regular guardian. Bacon's Abridgement, vol. 4, p. 546.

4. The notice and proceedings in this case were regular, and the decree cannot be questioned for the want of the appointment of a guardian *ad litem*. Parks v. Stonum, 8 Ala. Rep. 754.

5. The record shows that all the parties to this settlement reside in this State, and that the infant, E. A. King, had a regular guardian, who had notice of the settlement, and that no one appeared to contest the settlement. When an inferior court has jurisdiction, all intendments are made in favor of the proper exercise of that jurisdiction, which are made in courts of general jurisdiction, and the recitals of the court that certain facts were proved, import absolute verity. 15 Ala. 497; 4 ib. 158; 11 ib. 245; 6 ib. 611; 18 ib. 482.

6. It certainly is not shown, in this case, that the court erred to the prejudice of the plaintiff in error.

7. The right of an administrator *de bonis non* to call a former administrator or executor to settlement, is expressly conferred by statute; but there is no requirement upon him to do this in the Probate Court alone. It would be strange if an administrator *de bonis non* could not settle with his predecessor, when he is required by law to do so. He may protect himself by a settlement in court; but if he does not choose to do so, he becomes liable to the distributees for the consequences of an improper settlement, and his bond stands as security for that act, as well as any other act of his administration. The court may act upon the settlement so made,

if no objection is made; and if objection is made, the administrator *de bonis non* must explain the settlement so made, and show its propriety. The court can as well act upon a settlement presented in the report of the administrator *de bonis non*, as if made by the first administrator. Suppose in this case the executor had been cited to settlement, and he had produced the receipt in full of the administrator *de bonis non*, against all his liabilities to the estate, that would be a discharge to him. 12 Ala. 105; 6 Ala. 399.

DARGAN, C. J.—The first question presented to us by the assignment of errors is this: Was the notice given to the distributees sufficient to authorize the decree that was rendered? The notice itself is not before us, and we can only form an idea of its character from the order directing it to be given. This order is in the following language: "It is ordered by the court, that the said fourth Monday in September be set for the settlement of said estate, so far as the same has been administered, and that the account as stated be then allowed as upon a partial settlement." In the absence of the notice itself, we can only presume that it corresponded with the order directing it to be made, and, therefore, that it was a notice of a partial settlement, and not a final one. But the decree that was rendered is final in its character, and is conclusive as to the rights of the parties as they are ascertained by it. Hence the question is narrowed down to this: Will notice of a partial settlement justify the court in proceeding to a final settlement? Anterior to the act of the 11th of Feb., 1850, it was doubtful whether there was any difference in legal effect between annual settlements and final settlements; at least the act of 1843 left the question in a confused condition. But the act of 1850 declared the effect of annual or partial settlements, making them only *prima facie* evidence of their correctness, and subjecting them to be impeached for any error in law or fact, upon the final settlement. See Pamphlet Acts 32, 33. The consequence of this act is, that final and partial settlements differ widely in their legal effect; the former being conclusive, and the latter only *prima facie* evidence of their correctness. A notice, therefore, of an intended annual or partial settlement, will not authorize the rendition of

a final decree; and the court erred in proceeding to render a final decree in the absence of some of the distributees, the notice to them being only of a partial settlement.

We are also of the opinion, that the court should have appointed a guardian *ad litem* for the infant, notwithstanding she may have had a guardian of her person and property regularly appointed, but who failed to attend the settlement. We have on several occasions held, that it was error to proceed to a final settlement, where there were infant distributees, without appointing guardians *ad litem* to protect their interest. See Clack's Distributees v. Clack's Administrators, decided at the last term, and cases there cited. But the precise question here presented we do not remember to have decided.

We know it is the duty of all courts, to see that the interest of an infant, who is a party to a suit before it, is properly protected, and this can only be done, by appointing some one to supervise and protect his rights, when there is no one else that can or will do it. As this is the duty of the court, we do not see how this duty can be said to be performed or dispensed with, merely by showing that the infant had a guardian, but who failed to attend and supervise his rights. We apprehend, that if the cause was pending in a court of chancery, the Chancellor would not fail to appoint a guardian *ad litem*, because he was advised that the infant had a guardian regularly appointed; and even if he did, his decree would be liable to be reversed for this reason. And we know of no other rules of practice to apply to the Court of Probate, that will better secure the rights of infants, than those which obtain in the Court of Chancery; and we therefore think, that the court should have appointed a guardian *ad litem* for the infant defendant, inasmuch as her regular guardian failed to attend the settlement.

We are, however, referred to the case of Parks v. Stonum, 8 Ala. 755, in which it was decided, that it was not an error to render a final decree, even when there were infant defendants, provided they did not appear before the final decree was rendered, for the purpose of contesting the account; but this decision is opposed to several subsequent ones, and in this particular cannot be sustained. The statute, it is true, re-

quires that the Orphans' or Probate Court should appoint guardians *ad litem* for minors, if necessary; but we consider it necessary to be done in all cases, if the regular guardian fails to attend for the purpose of supervising the interest of the defendants.

We have intimated, that the rules of practice which obtain in the Court of Chancery should be applied to the practice of the Probate Court, in cases where they can be made to apply; but that must be understood to be confined to those cases where no rule of practice to be drawn from our statutes, or from the Ecclesiastical Courts of England, can be made to apply, which is the case in this instance.

We also think, that the court acted improperly, in ordering Hampton, the executor, to be discharged from liability to the estate. We know that an administrator *de bonis non* is authorized under our law to call on the executor or administrator in chief, who has resigned or been removed from office, to account to him for all assets that have come to the hands of such executor or administrator; and the consequence of this right is, that the administrator *de bonis non* may settle with him out of court, and give a full receipt or discharge from all liability, which could not be impeached unless for fraud or mistake. But we do not think that this right of the administrator *de bonis non* authorized the Probate Court to make the order in this particular instance. The validity of the receipt was a matter outside of the settlement; at least its validity was not propounded by James Hampton; nor does it appear that he moved for a discharge. But we infer from the record, that the court ordered his discharge merely because the administrator in his report showed that he had made a settlement with him. This was erroneous. It may be, that an executor or administrator in chief, who has settled with the administrator *de bonis non*, may apply to the Orphans' Court for a discharge from liability to the estate. That question, however, we do not decide; but conceding that he may, he should give notice of his intended application, produce his receipt showing the settlement, and move for a discharge.

But the mere fact, that the administrator *de bonis non*, upon a final settlement, represents that he has settled in full with the executor or administrator in chief, will not authorize the

court, *ex mero motu*, to discharge such executor or administrator from liability.

These are the only assignments of error we deem it necessary to examine; if there be any others that would work a reversal of the decree, they can be corrected in the court below upon another trial.

Let the decree be reversed, and the cause remanded.

BLACKWILDER *vs.* LOVELESS.

1. The enforcement of the specific execution of a contract in a court of equity, is not a matter of right in either party, but a matter of sound, reasonable discretion in the court; and the court uniformly refuses to decree a specific performance, except in cases where such a decree would be strictly equitable.
2. It requires much less strength of case to enable the defendant to resist a bill for the specific execution of a contract, than it does on the part of the plaintiff to maintain his bill; for, if the bargain be hard and unconscionable, or, if the specific execution of it would, under all the circumstances, be inequitable, the Chancellor should refuse to decree a specific execution, and should leave the parties to their remedy at law.
3. Where the complainant, having recovered a judgment against defendant, in an action of unlawful detainer of certain lands in defendant's possession, worth $300, to which defendant claimed title, and on which he had a growing crop, and having a writ of restitution in the hands of the sheriff, procured defendant to enter into a contract, by which, in consideration of complainant's note for $30, and the retention of possession for the remainder of the year, a period of four months and a half, defendant promised to deliver up the land at the expiration of the year, and executed to complainant his bond for title, the specific execution of the contract was refused, and the bill dismissed at complainant's costs.

ERROR to the Chancery Court of Chambers.

Heard before the Hon. W. W. MASON.

This was a bill for a specific performance, by the defendant in error against the plaintiff in error. It alleges, that, a controversy existing between the parties respecting the title and right of possession to a tract of land, known as the south west quarter of section eighteen, township twenty-two, range twenty-five, in Chambers county, plaintiff below sued Black-

wilder in an action of unlawful detainer, before a justice of the peace, and recovered a judgment for the possession; that thereupon said defendant in the judgment filed his bill, and obtained an injunction against the execution of the writ of restitution, which bill was afterwards dismissed, and the injunction dissolved, at the cost of the complainant therein; that the writ of restitution was then again issued, and placed in the hands of the proper officer, but the said Blackwilder still claiming title, and having a crop growing on the land, it was mutually agreed between them, that Loveless should allow said defendant to retain the premises until the 25th of December, 1849, and pay him the sum of thirty dollars by the said 25th day of December, 1849, in consideration of which, said Blackwilder agreed to make to him a quit-claim deed to said tract of land; and that this agreement was understood as a complete settlement and compromise of their conflicting claims; that the complainant executed his note, and the said defendant his title bond, in accordance to said agreement, and the sheriff was thereupon instructed to return the writ of restitution unexecuted.

Complainant then avers the tender of the money, first in paper, which was objected to, and then in gold and silver, and its refusal by defendant, who retains possession of the land, and is attempting to rent it to others, and refuses to execute a quit-claim deed agreeably to his bond. The bill prays an account of the rents and profits, and that the contract be specifically executed, &c.

The defendant, in his answer, admits the recovery in the suit of unlawful detainer; that he filed a bill and enjoined it, which bill and injunction was afterwards dismissed at his cost; but he insists that the judgment for the possession of the land was unjust; that complainant, before 1845, had purchased the land of one Jones, for $600, and paid $150 of the money, giving his notes to Jones for the remainder, ($450,) but after the notes became due, he (complainant) proposed to Jones to lose what he had paid, if Jones would cancel the contract, and release him from the payment of the notes; that this was agreed to, and the contract was thereupon rescinded; that defendant, being informed and believing that the contract was rescinded, agreed and contracted with Jones

for the purchase of said land, in 1845, for the sum of $300, and executed his notes for that sum to said Jones, and took from him his title bond, conditioned to make him title to the same; that he entered into possession under his contract, when the complainant claimed to hold the land until Jones should repay him the $150 which he had paid on the rescinded contract; that defendant, being anxious to retain the possession of the land, agreed with Loveless that he would pay him rent for the land, in the event he should be able to recover it from Jones by legal proceedings; that matters stood thus until March, 1848, when Loveless, without instituting any proceedings against Jones, sued out his writ of unlawful detainer, and obtained judgment; that he never notified the defendant to quit the possession of said land, until he (defendant) had paid to Jones the purchase money for the same; that, after the injunction obtained by the defendant against the judgment in the unlawful detainer case was dissolved, complainant caused his writ of restitution again to issue; that he claimed title to the land, and had a crop growing upon it, at the time he signed the bond referred to in the bill, which was worth some $300. He denies that he entered into the agreement, as a compromise, but insists that, being a poor man, and some seventy-six years old, he did so to save his crop, which would have been a total loss to him had the plaintiff obtained possession, as he could have recovered nothing from the plaintiff by way of damages, by reason of his insolvency. The land, at the time of the agreement, is averred to have been worth from three to five hundred dollars, and was sold by the defendant for thirty dollars, on account of plaintiff's threatening to dispossess him. He avers, that he took the note of the plaintiff for that sum, which has neither been paid nor tendered to him; avers that the plaintiff was insolvent and unable to raise that sum; admits that he, the defendant, has not much property, but says he believes he is able to pay any damages which a jury would assess against him by reason of his refusal to convey, and insists that said agreement was forced upon him, and that it is iniquitous and unjust.

William H. Smith, the sheriff of Chambers county, was examined on part of the complainant, and he states, that the

writ of restitution was placed in his hands as sheriff to be executed; that Loveless told Blackwilder, unless he made some arrangement he would dispossess him immediately, upon which the parties entered into a compromise, and a note and bond were executed as charged, the said sheriff witnessing the bond, which he designates as a quit-claim deed.

Willis C. Shipp, another witness for the complainant, states, that he wrote the bond by the direction of the complainant; and said bond and note were executed and delivered, and the sheriff ordered to return the writ of restitution satisfied, except as to the cost; says that Blackwilder, he supposes, was about seventy years old; witness did not hear the contract made, and only saw the writings executed; heard no inducements or threats held out by Loveless to compel the said defendant to execute the contract.

It was admitted, by the written consent of the counsel, that, had Loveless tendered the specie to defendant before filing the bill, it would have been refused, and that the quit-claim deed mentioned by Smith was the bond, the execution of which he proved.

Upon this proof, the Chancellor decreed a specific execution of the contract, which decree is assigned for error in this court.

ALLISON, for the plaintiff in error.

FALKNER, *contra*.

CHILTON, J.—It is said, the enforcement of the specific execution of contracts in a court of equity, is not matter of right in either party; but it is a matter of discretion in the court; not, indeed, of arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion, which governs itself, as far as it may, by general rules and principles; but, at the same time, withholds or grants relief, according to the circumstances of each particular case, when these rules will not furnish any exact measure of justice between the parties. 2 Story's Eq. Jur. § 742, and cases cited by this author in note 1, p. 58, Vol. 2, 5th Ed.

The court uniformly refuses to decree a specific perform-

ance, except in cases where such decree would be strictly equitable. Ib. § 750.

It requires much less strength of case to enable a defendant to resist a bill to perform a contract, than it does on the part of the plaintiff to maintain such bill; for, if there be any fraud or mistake, or if the bargain be hard and unconscionable, or the specific execution would, under all the circumstances, be inequitable, the Chancellor should refuse to decree the specific execution of the agreement, and leave the parties to their remedy at law. 2 Story's Eq. § 769, and cases cited, p. 92, n. 1, 5th Ed.

The complainant shows no title to this land. He seeks that which the defendant has. The land is worth at least three hundred dollars; and armed with a process which would turn the defendant out and sacrifice his growing crop, he is enabled to dictate terms to him, and procures the bond for title, in consideration of the promise of thirty dollars, and the retention of the possession from the 8th August, 1849, until the 25th December, 1849.

We cannot resist the conclusion, that this old man did not enter into this contract voluntarily. The writ of restitution was held *in terrorem* over him, and he was immediately to be turned out unless he came to terms. He was not in a condition to deal at arms-length with the plaintiff, nor to insist upon a fair and equitable bargain. Having shown the circumstances under which he executed the bond, it was incumbent on the plaintiff, who invoked the exercise of the court's discretion in his behalf, to show that he had not extorted an unreasonable bargain; that he had given a just compensation for this land, and was equitably entitled to it. Otherwise, it was the duty of the court to leave the parties to their remedy at law.

We will not say there was any fraud or mistake in this case; but we are satisfied that the defendant did not deal with the plaintiff on equal terms, and that, by reason of the peculiar condition in which the defendant was placed, the plaintiff was enabled to get his bond for title for a very inadequate consideration.

True, the parties speak of this as a compromise. It matters not by what name they call it; the facts show, that it was

a sale by defendant of his interest in the land for thirty dollars, secured by note, possession to be given after the expiration of some five months: plaintiff in the mean time agreeing not to turn the defendant out by virtue of process, not predicated upon the title to the land.

We think, it is just such a case as the parties should be left to their legal remedies. The decree must be, therefore, reversed, and a decree here rendered dismissing the bill, at the cost of the defendant in error.

KIMBRO *vs.* WALLER.

1. An attorney at law may interpose the plea of the statute of limitations, when sued by his client for money which he has collected as attorney, and failed to pay over.
2. Although no action can be maintained against an attorney at law for failing to pay over money collected for his client, until he has failed or refused to pay it over *after demand made*, yet the client cannot, by this principle of law, excuse his laches in not making a demand within a reasonable time after the collection and conversion of the money by the attorney.
3. In assumpsit against an attorney at law for money collected as attorney and not paid over, defendant pleaded the statute of limitations, to which plaintiff replied "that the money sued for was collected by defendant, as an attorney at law, in the State of Tennessee, and that no demand was made of him for said money until a short time before the commencement of this suit, and that the statute only began to run from the demand." *Held:*
That the replication was demurrable.

ERROR to the Circuit Court of Butler.

The plaintiff in error brought an action of assumpsit against the defendant, in the Circuit Court of Butler. The declaration contains two counts. The first avers, that the defendant, in 1836, being an attorney and counsellor at law, collected, as such, a sum of money for the plaintiff, from one Davis, which he has failed and refused to pay over.

The second is the ordinary mixed count for work and labor, money had and received, &c.

The defendant pleaded the statute of limitations; to which

the plaintiff replied, "that the money sued for was collected by the defendant as an attorney at law in the State of Tennessee, and that no demand was made of him for said money, until a short time before the commencement of this suit, and that the statute only began to run from the demand." To this replication there was a demurrer, which was sutained by the court, and the plaintiff refusing to reply over, judgment was rendered for the defendant.

From this judgment the plaintiff prosecuted his writ of error to this court, and here assigns the judgment of the court below on the demurrer, for error.

J. F. JOHNSON, for plaintiff in error:

1. The replication is good, and the demurrer to it should have been overruled. Towns, Executor v. Bardwell, 1 S. & P. 36.

2. The replication avers, that the money was collected by defendant while he was a resident of another State, which is admitted by the demurrer. The court will not presume that defendant's residence has been changed, and that he has resided in this State more than six years, before the commencement of the suit. Defendant should have shown this by rejoinder, if such be the fact. Defendant must show, that no remedy exists against him, under our laws. It is not incumbent on plaintiff to do so. Jones v. Jones, 18 Ala. 248.

3. The defendant must show, that he has been within the jurisdiction of our courts the entire period provided by our statutes as a bar. Smith's Administrators v. Heirs of Bond, 8 Ala. 386.

LIGON, J.—The pleadings appear to have been made up in short in the court below, and consequently we shall pay no regard to the form, since we think there can be little difficulty in ascertaining what is the substance of the replication.

The only question presented for our consideration is, whether an attorney at law will be allowed to interpose the plea of the statute of limitations, when sued by his client for a failure to pay over money which he has collected as attorney.

In this form this question has never before arisen in this court, so that in its consideration we must be guided by prin-

ciple, and the decisions of other courts which have passed upon it.

Claims of this character are not included in the exceptions enumerated in our statute of limitations; (Clay's Dig. 326, § 78) nor does the relation of attorney and client belong to that class of express, continuing and subsisting trusts, to which the statute is, in equity, held to be inapplicable. It is, at most, but a constructive trust. Angell on Lim. 199. There is nothing, then, in the statute itself, in the nature of the demand, or in the relation of the parties, to prevent the statute from running, and the attorney from interposing the plea.

It is well settled, upon authority, that no action can be maintained against an attorney for failing to pay over money collected for his client, until it has been demanded, and he has failed or refused to pay it over. Taylor v. Bates, 5 Cowen 376; Rathbun v. Ingalls, 7 Wend. 320; Staples v. Staples, 4 Greenl. 533; Taylor v. Armstead, 3 Call 200; Hutchings v. Gilman, 9 N. Hamp. 359; Buchanan v. Parker, 5 Iredell 597. But if an attorney may shield himself from responsibility, upon the ground that no demand has been made, it does not follow, that the client can excuse his laches by a principle which is intended to protect from costs an agent who has acted honestly and diligently in the business of his principal. Although the defendant may have been guilty of gross negligence in this case, which would have subjected him to a suit, the plaintiff also has been guilty of negligence, by which, in an ordinary case, he would have lost his right of action. He places his claims against Davis in the hands of the defendant in 1836; yet he appears to have made no inquiry about them for fourteen years. Although an attorney may protect himself from suit by want of demand, he is not, for this reason, to be subject all his lifetime to the stale demands of his clients. The plaintiff should have made his demand in a reasonable time after the money was collected and converted by the attorney, so as to bring his suit within the six years allowed by the statute. The conversion here is averred to have taken place in 1836; the plaintiff, therefore, should have brought his suit within six years from that time, and it is no excuse for him that he had made no demand. It was his own fault that he did not put himself in a condition to

sue, and he will not be allowed to take advantage of his own laches. 4 Peters 172; 13 Sm. & Mar. 328; 15 Wend. 302.

There is no error in the judgment, and it is consequently affirmed.

DUDLEY *vs.* HORN AND WIFE.

1. Words spoken by defendant of and concerning plaintiff, charging him with having beaten his wife so that he made her miscarry, are not actionable; they do not, of themselves, and without an innuendo, amount to more than a charge that plaintiff committed an assault and battery on his wife.

ERROR to the Circuit Court of Russell.
Tried before the Hon. ROBERT DOUGHERTY.

This was an action of slander, brought by the plaintiff against the defendants in error, for words spoken. The court below sustained a demurrer to the declaration, and this is now assigned for error.

S. F. RICE, for plaintiff in error.
J. E. BELSER, *contra.*

GOLDTHWAITE, J.—The declaration alleges, that Elizabeth Horn, wife of Michael Horn, falsely and maliciously charged the plaintiff in error with beating his wife, so that he made her miscarry, and contains no innuendo explanatory of the words. The ruling of the court below, in sustaining a demurrer to this declaration, is the point presented by the assignment of errors.

The words charged in the declaration do not, of themselves, and without any innuendo, amount to more than a charge that the plaintiff had committed an assault and battery on his wife. The speaking of such words is not actionable. Skinner v. White, 1 Dev. & Bat. 473; Andres v. Koppenheafer, 4 S. & R. 261.

The judgment is affirmed.

RANKIN, DURYEE & CO. ET AL. *vs.* LODOR ET AL.

1. A debtor who is in failing circumstances may make an assignment preferring one creditor or class of creditors to another; if the assignment conveys his whole property, and contains no stipulation for a share of the proceeds to result to himself, and reserves no control whatever over the property, he may provide for the payment of one class of creditors absolutely, and for another class only on condition of their releasing all further claim upon him, by signing the deed containing such stipulation.
2. If the provisions of the deed are clearly beneficial to the creditor, his assent to it will be presumed, without his signing it; otherwise, his assent must be actually had.
3. Generally, where the debtor seeks to postpone the payment of his debts, by conveying property in trust to secure or pay them, *all* the creditors must assent to the deed, to give it *any validity*, because that is the manifest intention of the grantor.
4. A deed of trust executed by a firm and one of the partners individually, who were in failing circumstances, to secure the payment of their debts, contained the following provisions: The trustee was authorized to receive, collect, sell and dispose of all the property conveyed by it, with all convenient speed, on such terms as he might deem expedient, and, out of the proceeds, after first discharging the costs and expenses of the trust, to pay the debts of the creditors, who were made parties of the third part to the deed, according to their priority in signing it; first, those who assented to it within *ninety* days were to be paid equally in full; secondly, those who assented to it within one hundred days, in like manner, out of the residue; and thirdly, those who assented to it within one hundred and twenty days. The trustee was also authorized to carry on the business of the firm until the assent or dissent of the creditors should be expressed, or until the expiration of a reasonable time for ascertaining it, and to employ clerks and agents to assist him in the execution of the trust; the trustee was not to be chargeable, except for his own acts and defaults, nor for any moneys except such as actually came to his hands, nor for any loss that might happen without his wilful default. The deed also contained a provision, by which those creditors who assented to it, released all their claims and demands against the grantors. *It was held:*
   1. That the assent of *all* the creditors was not required, to give the assignment operative force and effect as a deed; but the assent of any one of them made it complete in law, and vested the whole legal title in the trustee.
   2. That after the whole legal title was thus vested in the trustee, the levy of attachments and executions on the property by other creditors did not give them any preference or priority over those creditors who subsequently assented to the deed, within the time prescribed by it.

ERROR to the Chancery Court of Dallas.

Heard before the Hon. W. W. MASON.

Rankin, Duryee & Co. et al., who were mercantile firms doing business mostly in New York, filed their bill in equity against the defendants in error, to obtain the aid of chancery in the collection of their several debts against the firm of E. & J. W. Ransom, which was composed of Elijah Ransom and Joel W. Ransom, and against said Elijah Ransom individually.

The bill alleges, after describing particularly the several debts, that judgments have been obtained on some of them, and that legal proceedings have been commenced, and are still pending, on others; that, in the suits now pending, original or ancillary attachments have been issued against said Joel W. Ransom, on the ground that he is a non-resident; and that either attachments or executions had been issued in all the cases, and levied on certain property, belonging either to the said firm or to said Elijah individually, but covered by an assignment executed by them to John A. Lodor as trustee, on the 13th of October, 1849. This deed is alleged to have been executed while the said Ransoms were in failing circumstances, or already insolvent to a considerable amount, and its material provisions are set out in the bill, to which it is made an exhibit.

This deed may be thus described: It purports to be a deed between three parties, viz: Elijah Ransom and the firm of E. & J. W. Ransom as grantors, Lodor as trustee, and the creditors of the grantors as beneficiaries, or parties of the third part. The debts due from the grantors to the beneficiaries are first specifically enumerated, amounting in the aggregate to over sixteen thousand dollars. For the payment of these debts, the grantors convey to the trustee their whole stock of merchandize, their notes and accounts, several lots in Cahawba, a slave, and some other personal property, upon the following trusts: To sell and dispose of all the property conveyed, with all convenient speed, on such terms as the trustee may deem expedient, and to collect with all dispatch the debts outstanding, and out of the proceeds to pay and discharge, first, the costs and expenses attendant upon the execution of the trust; secondly, the debt of Perrine & Crocheron, who are one of the parties of the third part, for $225, due for house rent; thirdly, to pay *pari passu* the debts of all

creditors who should sign the deed within ninety days from its date; fourthly, to pay in like manner, out of any residue that might remain, all those creditors who might sign the deed within one hundred days from its date; fifthly, to pay in like manner, out of any residue that might still remain, the debts of all those creditors who might sign the deed within one hundred and twenty days.

It is next provided, that the trustee shall continue to conduct the business of the firm, as it was then conducted, for the benefit of all concerned, until the assent of the creditors to the deed could be obtained, or their dissent ascertained, or until the expiration of a reasonable time for such assent to be given after notice; and should then proceed to sell as before directed. The trustee is empowered to appoint all necessary clerks and agents, to assist him in the execution of the trust, and to allow them such compensation as he may deem proper, out of the trust funds, and to pay himself a reasonable compensation out of the same. It is then declared, that the purchasers of the trust property from the trustee shall be exempt from all responsibility, in respect to the faithful application of the trust moneys, and that the trustee shall only be chargeable for his own acts and defaults, and for such money as shall actually come to his hands, and such losses as shall happen through his wilful default. The trustee is next appointed the lawful agent and attorney in fact of the grantors, to demand, collect and sue for all claims due to the firm, with power to make compromises, grant acquittances, and appoint agents and attorneys under him at pleasure, for the like purpose.

It is next provided, that, after the business of the firm has been conducted as usual for the space of ninety days, the stock of merchandize shall be sold at auction, for cash, after due notice, unless the trustee and the creditors may agree upon other terms of sale. Then follows a provision, by which the several creditors, in consideration of the premises, remise, release, relinquish and forever quit-claim all debts, demands, suits and actions of every kind against the said grantors. This deed, of which the substance has been stated, was dated October 13, 1849, and recorded on the 15th October.

The bill alleges, that Lodor, the trustee, has taken ostensi-

ble possession of the stock of goods conveyed by the deed, and had sold a part thereof to the amount of $500 or $1000, before the said attachments and executions were levied; that sundry other judgments were rendered against the Ransoms, on the same day on which the judgments of complainants were rendered. The complainants claim the interference and assistance of chancery on six distinct grounds. These are:

1. That Joel W. Ransom is a non-resident, and has property in this State, and they invoke the provisions of the act of February 5, 1846, on this ground; also on the ground that the said firm are fraudulently disposing of their property. They allege no actual fraud, but insist that the deed is wholly inoperative and void, until the actual express assent of all the creditors is obtained; and they allege, that only two or three out of all the creditors have actually assented;

2. But if this position is not correct, then complainants aver that the deed is wholly void, except as to the assenting creditors, so far as respects complainants and their debts, for which liens upon the property have been fixed by the levies of the attachments and executions; and that, notwithstanding the existence of such liens, the trustee is in possession of the property, and is proceeding to dispose of it, so as to render fruitless complainants' superior diligence in fixing their liens upon it;

3. Independently of the statute of 1846, complainants claim the right to come into a court of equity, to relieve the property from the incumbrance imposed upon it by the deed, and to prevent its sacrifice, if sold under their executions and attachments while so embarrassed;

4 Complainants claim the right to come into equity, to have the assets properly marshalled, inasmuch as some of their debts are the individual debts of Elijah Ransom, and others are firm debts; and the property is also mixed;

5. Complainants seek a discovery of further assets belonging to said firm;

6. They set out a list of the debtors to the firm, and also to the individual partners, and ask that the money in their hands be condemned.

The bill prays, that the property may be attached; that the trustee and all other persons may be enjoined from col-

lecting, selling, or disposing of it, without the further order of the court; that the assets may be properly marshalled, and the lien of the complainants settled, and declared to have priority, and to be first paid out of the proceeds.

A supplemental and amended bill was filed, which supplies some defects and omissions of the original bill, by making some other creditors who had signed the deed parties defendants, and by extending the scope of the bill to other debts. This supplemental bill charges, but in general terms only, both actual and constructive fraud upon the deed of assignment, and prays that it may be declared void.

Elijah Ransom answers the bill at great length, setting forth a history of his business, and the circumstances by which he became so much embarrassed; denies all fraud in the execution of the deed of assignment, and undertakes to show that the course which he adopted was the best and safest for all parties concerned. This answer was filed January 24, 1850.

Lodor, the trustee, did not answer the bill, but, on the 11th December, 1849, he filed his original bill against Rankin, Duryee & Co. and the other complainants in the first bill. In this bill, he sets up the deed of assignment, and alleges that it was executed fairly, honestly, and with the *bona fide* intention of making the most out of the assets of the firm for the payment of their debts. The bill sets out all the provisions of the deed, and a list of all the debts secured by it. It then alleges, that notice was given to the creditors by the trustee, to come in and sign it, informing them that the deed had been recorded, and the property delivered into his possession; that he kept the store open, hired a competent clerk, and continued to sell goods until November, 23, 1849, when he was prevented from carrying on the business any longer, by the levy of the attachments and executions of the several creditors who are made defendants to the bill; that, at this time, he had not been able to receive answers from most of the creditors, respecting their willingness to sign the deed, and that they were afterwards prevented from doing so, by the seizure of the goods under these attachments and executions; that, owing to the seizure of the goods, it is not in the power of the trustee to execute the trust, though willing and anx-

ious to do so; that, at the time the deed was executed, there were no liens fixed by law on the property, and all the creditors had the same right to come in and assent to its provisions.

The prayer of the bill is, that, for the protection of the creditors and the trustee, the deed may be declared good and valid; that the property conveyed by it may be disposed of, and the proceeds distributed among the creditors under the provisions of the deed, according to the directions of the court; that the said defendants and the sheriff be enjoined from proceeding to sell under the attachments and executions, and that they be required to re-deliver the property to the trustee; and that the court would fix the compensation of the trustee and his solicitors.

By agreement between the parties, formal answers to both bills were considered as filed, in short, without affidavit, and the two cases were brought to a hearing together, by consent, upon an agreed state of facts. This agreement contains all the material facts above stated, relating to the execution of the deed, the insolvency of the grantors, the non-residence of Joel W. Ransom, the recovery of judgments by the several complainants, and the levy of their attachments and executions. It was admitted, that the following were all the creditors who had assented to the deed, viz: Perrine & Crocheron, October 31, 1849; Lucretia Watrous and Tracy, Allen & Co., December 15; Arcularing & Bennett, December 19; Hotchkiss & Fenner, December 29; Murphy & Benedict, December 27; Howe, Mather & Co., December 31; Charles P. Freeman, January 4, 1850; E. & J. Bussing, Tweed & Burrows, and Dickins & Churchill, January 9, 1850; and Henry Stoddard & Co., January 11, 1850.

The Chancellor decreed, that the deed of assignment was valid *in toto;* that the injunction of Rankin, Duryee & Co. *et al.* should be dissolved; and that the injunction of Lodor should be made perpetual. The register was ordered to take and state an account, and some other formal orders were made.

Upon this decree, Rankin, Duryee & Co. *et al.* sued out a writ of error, and now assign for error:

1. That the court erred, in not declaring the deed of as-

signment void, for the want of the assent of all the creditors, and decreeing distribution of the assets in the hands of the trustee among the creditors according to their respective liens, regardless of the assignment;

2. That, if the deed should not have been absolutely set aside, for want of the assent of all the creditors, it should have been set aside as to all the creditors who did not assent before the levies of complainants' attachments and executions were made; none of the creditors having assented at that time, except Perrine & Crocheron.

LAPSLEY & HUNTER, for plaintiffs in error:

I. We do not think it necessary to deny the validity of the deed, on the ground of fraud on its face, or of fraud in fact. The simple ground we take, is, that the express assent of the creditors is necessary to make it operative and effective. An express assent was necessary, for three reasons:

1. The deed itself expressly requires it; the creditors are to sign it, and a clause is inserted in it by which they release all their debts, except what they may get under the deed;

2. The clause requiring a release of their debts from the creditors, undoubtedly requires their assent. It cannot be pretended, that the debtor alone has the right thus to change his original contracts, by making his creditors accept a part of their debts in satisfaction of the whole. Our Supreme Court has decided, that he cannot, without their express assent, extend the time of payment.

3. The deed gives powers to the trustee which render an express assent of all the creditors indispensable. He has the most plenary powers; he is to have the absolute control of the property; he may sell, arbitrate, compromise, appoint agents, employ attorneys, pay them commissions, and retain his own commissions out of the proceeds of the trust property; and yet he is only to be liable for his own "wilful defaults," and for the money which actually comes to his hands.

All the authorities agree, that, when the deed imposes any conditions on the creditors, their express assent is necessary. Express assent is unnecessary, *only* in those cases where the deed is absolute, imposes no conditions, and is clearly beneficial. Elmes v. Sutherland, 7 Ala. 262; Lockhart v. Wyatt,

10 ib. 231; Hodge v. Wyatt & Houston, ib. 271; Cullum v. Bloodgood, 15 ib. 42; 2 Story's Equity, §§ 1036 b, 1045, 1046, 1196.

II. If the express assent of *all* the creditors was necessary, to give the deed *any* validity or efficacy, then the complainants in this bill are entitled to precedence over all the other creditors, because, by their superior diligence, they have first fixed a lien on the property; but if the court should hold, that the creditors who signed the deed before the attachments and executions were levied, are entitled to the preference, then we contend, that the deed is valid *as to them only*, and that the complainants are certainly entitled to preference over the other creditors, who did not sign until after their levies were made. Perrine & Crocheron are the only creditors whose debt is to be paid absolutely and unqualifiedly. Their assent is to be presumed, because the deed is beneficial to them; the deed is valid as to them, and the legal title being thereby vested in the trustee, rendered our bill in equity necessary, in order to compel the execution of that particular trust, and have the residue of the property appropriated to our debts. As to the other creditors, the deed is but a proposition of compromise, which the debtor himself might revoke before it was accepted; and the complainants, by filing their bill, signify their dissent from the proposition, and thus do what the debtor himself might have done.

III. But a conclusive ground to show that the deed should have been set aside upon the admitted case, is this: There was no admission or proof that the debts secured by the deed had any existence; and it is well settled, that, in a contest with creditors, the debts must be proved. The debts of the complainants are admitted; not so, as to the assenting creditors. McCain v. Wood, 4 Ala. 258; Branch Bank at Decatur v. Kinsey, 5 ib. 9; Goodgame v. Clifton, 13 ib. 584.

CAMPBELL & BYRD, *contra:*

1. As to the first point made by the plaintiffs in error, that the assignment is void, because it was made while suits were pending against the grantors, and on the eve of judgments being recovered: It is indisputably allowable for a debtor to give a preference to certain of his creditors. Grimshaw v.

Walker, 12 Ala. 101; 7 Ala. 142; 4 Ala. 374; 9 Porter, 566. The only preference here given, is to those who first sign the deed. The validity of the deed cannot be in any manner affected by the fact that suits were pending, or that it was made in order to defeat the lien of the judgments to be rendered, provided it devotes the whole of the property to the payment of the debts of the grantors. 5 Durn. & East, 235; 3 M. & Sel. 37.

2. As to plaintiffs' second point, that the effect of the deed was to hinder, delay and defraud creditors: Actual fraud is not charged; and the only inquiry is, whether there is legal fraud. To give a preference to creditors in the manner in which it is here done, is not fraudulent. If the deed is made upon a good consideration, and is *bona fide*, then it is not fraudulent, though voluntary. 1 Story's Equity, § 353. All that is required is, for the debtor to devote the whole of his property to the payment of his debts. If the judgment liens had attached, or the defendant had been under arrest, it is conceded that the conveyance would have been fraudulent and void, as to the judgment or arresting creditor, Wood v. Borland, 8 Paige 566; or to an assignee in failing circumstances, or known to be insolvent. 8 Paige 417; Cowper 432.

3. As to the third and fourth points, viz: that the deed is not absolute and unconditional, but imposes terms on the creditors, and for this reason is wholly void, until the express assent of all the creditors is given; or, that it is only valid as to the assenting creditors: As a full answer to the first proposition, we refer to the cases of Robinson v. Rapelye & Smith, 2 Stewart, 86; Ashurst v. Martin, 9 Porter, 566; Halsey v. Whitney, 4 Mason, 206; 3 Penn. R. 86; Fox v. Adams, 5 Greenl. R. 245; Haven v. Richardson, 5 N. Hamp. 113; Andrews v. Ludlow, 5 Pick.; Lippincott v. Baker, 2 Binney, 174; Livingston v. Bell, 3 Watts' R. 198. The *quaere* put in the case from Binney's Reports, does not apply to the facts of this case, for the reason that a large number of creditors accepted the deed before any lien attached. This is shown by complainants' bill. In England, deeds with such stipulations are held valid, even against the crown. Rex v. Watson, 3 Price, 6; Johnson v. Arnold & Baker, 4 Barn. & Ald. 479; 8 Moore, 580; 3 B. & C. 6. As to a stipulation

for a release generally, see 4 Durn. & East, 166; 2 Kent's Com. 534, and authorities there cited; 2 Story's Equity, 302; Scott v. Morris, 9 S. & R., 123; 10 ib. 439; 7 ib. 510.

The second branch of this objection assumes, that the deed is wholly void unless assented to by the creditors. This position cannot be maintained, from what has already been shown. It certainly forms no ground of objection, when a trustee is interposed, who assents to the deed; for he will be presumed to have assented for all the creditors. Small v. Marwood, 7 B. & C. 300; 2 Gall. 557; Smith v. Wheeler, 1 Verm. 128; 7 Wheat. 556; 10 Yerger, 146; 4 Johns. Ch. R. 529; Ellison v. Ellison, 6 Vesey, 662; 3 Sim. 1; 2 Mylne & Keene, 492.

PHELAN, J.—Two positions are relied on by the plaintiffs in error: 1. That the deed of assignment from the Ransoms to Lodor as trustee, is inoperative and void in law, for the want of the assent of all the creditors, who are named as constituting the third party to the deed; 2. That, if the deed is not wholly inoperative and void for the want of the assent of all the creditors, at least it is so as to those creditors who had levied upon the property, against such other creditors as had not signed the deed previous to such levy.

The first position we consider to be untenable. It does not require the assent of all the creditors in such a deed of assignment as this, to prevent it from being wholly inoperative. The following may be laid down, as settled legal propositions in this State: A debtor in failing circumstances may make an assignment, preferring one creditor or one class of creditors to another. If he conveys his whole property to trustees, for the payment of his debts, and retains no control whatever over it, and stipulates for no share of the proceeds to result to himself, he may provide for the payment of one class of creditors under the deed absolutely, and for another class only on condition of their releasing all further claim upon him, by signing the deed containing such stipulation. Where the provisions of the deed of assignment are clearly beneficial to a creditor, his assent to the deed will be presumed, without his signing it; where it is not so, his assent will not be presumed, but must be actually had. As au-

thority for these propositions, see Robinson v. Rapelye & Smith, 2 Stewart, 86; Ashurst v. Martin, 9 Porter, 566; Wiswall v. Ross et al., 4 Porter, 321; Gazzam v. Poyntz, 4 Ala. 374; Kinnard v. Thompson, 12 Ala. 487; Governor, use &c. v. Campbell, 17 Ala. 566; Brown v. Lyon & O'Neal, 17 Ala. 659; Elmes v. Sutherland, 7 Ala. 262; Mauldin v. Armistead, 14 Ala. 702; Abercrombie v. Bradford, 16 Ala. 560; 2 Story's Equity, § 1036.

When we consider the foregoing settled principles of law, and look at the provisions of the deed in this case, it needs no argument to show, that such a deed as the present does not require the assent of all the creditors, to give it operative force as a deed. There is a class of deeds in trust, or assignments, which are not good at all, without the assent of all the creditors. It is sufficient to say, that this deed does not come within that class. The class of cases to which I refer, is considered, and the law applicable to them laid down, in the cases of Elmes v. Sutherland, 7 Ala. 262; Hodge v. Wyatt, 10 Ala. 271, and Kemp & Buckey v. Porter, 7 Ala. 138. They are, generally, where a man seeks to postpone the payment of his debts, by conveying property in trust to secure or pay them. In such a case, *all* the creditors must assent, to give *any* validity to the deed, because that is the manifest intention of the grantor. 7 Ala. 262.

The provision of the deed in this case, in respect to the power of the trustee to appoint agents, and touching his responsibility for his own conduct, as well as that of his agents, is a literal copy of the provision in the deed in the case of Robinson v. Rapelye & Smith, 2 Stewart, 86; and the case of Ashurst v. Martin, 9 Porter, 566, is an authority which covers this question, in favor of the validity of such a provision.

It remains to be seen, whether the second position relied on by the plaintiffs in error is correct, viz: that, if the deed is not wholly void and inoperative for the want of the assent of all the creditors, it is at all events so as to those creditors who have refused to sign it, and have made levies on the property, against all who had not signed the deed previous to such levies. What, let us ask, is such a deed of assignment, as the one made by the Ransoms to Lodor? A mercantile firm in failing circumstances, wishing to turn their

property to the best advantage for their creditors, and also to secure to themselves such benefits as the law will allow in such a case, determine, for satisfactory reasons, to provide absolutely for the payment of one or more debts, but in respect to the great body of their creditors, to make to them only a proposal for a compromise. Such a proposal they may lawfully make, either to each creditor separately, or to the whole at once. For obvious reasons, the failing firm prefer to make the offer to all at once, because by that means they will be most likely to gain the benefit which they seek, viz: the acceptance of their offer to compromise. "We have the right by law," say the failing firm, "to prefer one creditor over another, where there are no liens fixed by law on our property. Now, if we propose to give a preference to those who will first accede to this offer to compromise, we have reason to hope and expect that our creditors, to a great extent, will be tempted to accede promptly to our proposal in order to gain this preference?" The assignment of the Ransoms to Lodor is nothing more than an attempt to do, in lawful form, the thing I have been describing. This is the complexion put upon the matter by the argument of the plaintiffs in error, and to this extent I am disposed to agree with them.

So far, then, as concerns Perrine & Crocheron, one of the parties of the third part, the instrument is a deed complete in law under any aspect of the case, putting out of view the question of fraud in fact, which is not presented by the assignment of errors, and seems not to have been made a question in the court below. They signed the deed before the levies of the complainants on the trust property were made; so that, as to them, the instrument is made complete as a deed.

But here the plaintiffs in error insist, that, although the deed, as to Perrine & Crocheron, is complete, the effect of that goes no farther than to make good the priority of Perrine & Crocheron only; and that those creditors who had their attachments and executions levied, after Perrine & Crocheron had signed, but before the execution of the deed of assignment by the other creditors, will be preferred to those other creditors, although the latter may have signed the deed

within the time prescribed by its terms. They consider the instrument, as to all those who did not sign before their levies, as conveying to the trustee nothing but a mere power, which the grantor himself might revoke, as to them, at any time before the execution of the deed by them respectively; and that being a mere power, an attaching or execution creditor may step in, and by his levy revoke it in place of the grantor.

The fault of the argument is found to lie in this position: After the execution of the deed by Perrine & Crocheron, the instrument was no longer a power revocable by the grantor, as to them at least. As has been shown, it then became a deed complete in law, and as such, vested, of course, in the trustee the whole legal title to the trust property. There cannot be the slightest doubt, that, after that event, Lodor, the trustee, could have brought his action of detinue, and recovered against any and all persons who might disturb him in the possession of this property, whether under color of execution against the Ransoms or otherwise. Brown v. Lyon & O'Neal, 17 Ala. 659. No point is raised, as we have said before, by the assignment of errors, touching the question of fraud in fact in the execution of this deed. After the execution of the deed by Perrine & Crocheron, and the vesting of the whole legal title, by force of that act, in the trustee. Lodor, there remained nothing upon which an attachment or execution could be levied, since nothing but the legal title is subject to levy and sale by attachment or execution.

It follows, from what has been said, that those creditors named in the deed of assignment, who came in and executed the deed within the time prescribed by its terms, after the execution of the same by Perrine & Crocheron, although subsequent to the attempt of complainants to levy on the trust property by attachment and execution, were entitled to preference and priority, according to the provisions of the deed of assignment.

Whether it was necessary for the complainant, Lodor, to make proof of the *bona fides* of the debts secured by the deed, as the case is presented; or, if so, whether the admissions on which the parties went to a hearing, do not suffice

for that purpose, we decline to decide, for the reason that the question is not presented by the assignment of errors.

As the points already discussed are the only ones presented for our consideration, we have simply to add, that we find no error in the decree of the Chancellor, in those particulars, and the same is consequently affirmed.

PRYOR *vs.* BECK.

1. The general rule is, that it is sufficient to assign a breach in the words of the contract; if the language employed is co-extensive with the words of the condition, and negatives its performance, it is sufficient.
2. A general demurrer must go to the whole declaration; and if the declaration be good to recover a portion of the sum sued for, the demurrer should be overruled, except in cases, if any such exist, where the entire amount must be recovered or none at all.
3. In debt on bond given for the security of costs, it is not necessary to allege in the declaration, that an account or bill in writing containing the particulars of the fees was produced or ready to be produced to the defendant, nor that the clerk and sheriff kept fee books in which were entered the fees sought to be recovered.
4. A transcript of a judgment certified in due form by the proper officer is admissible in evidence for the plaintiff, in a suit against the securities for costs, although the clerk by whom it is certified may be entitled to a portion of the costs sought to be recovered.
5. After the cost is taxed it becomes part of the judgment, and cannot be impeached, when drawn in question collaterally, either in the court in which the judgment was rendered, or in any other; the items of cost can only be re-examined by a direct motion to retax, made in the court in which the judgment was rendered.
6. In debt on bond for security of costs, the plaintiff can recover the fees of the witnesses who were summoned by the plaintiff in the original suit; he is a trustee for the benefit of all, and must recover to the extent of the interest of all who were designed to be protected by the bond.
7. When no pleas are found in the record, and a trial is had on the merits, the Appellate Court will only presume that such pleas were filed as went to the merits of the action, and will not presume that a special plea, technical in its character, and not reaching the merits of the cause, was also filed.
8. A certified transcript of a judgment is only *prima facie* evidence of the judgment itself, and does not preclude the defendant from showing the true amount of the judgment; this may be done, either by introducing another transcript for the true amount, certified by the same officer, (and then the jury must de-

cide which transcript is correct,) or by copies connected with parol proof of their correctness.

9. But an execution signed by the clerk, but not certified by him, with nothing upon it to show that it has ever been in the hands of the sheriff, cannot be regarded either as the original execution or a certified copy of it, and is not admissible to prove the amount of the judgment for costs.

ERROR to the Circuit Court of Montgomery.

Tried before the Hon. GEORGE GOLDTHWAITE.

This was an action of DEBT, by Beck as surviving obligee, on a bond executed by Pryor and others, as securities for costs in a certain suit instituted by Margaret Batchelor against Pharr & Beck. The condition of the bond is set out *verbatim* in the opinion of the court, and also the breach assigned in the declaration. The defendant demurred to the declaration, and his demurrer being overruled, he pleaded over, but his pleas do not appear in the record.

The plaintiff offered in evidence a certified transcript of the judgment rendered in the case of Batchelor v. Pharr & Beck, to which the defendant objected, on the ground that the clerk by whom it was certified was interested in the recovery, being entitled to a part of the costs. The objection was overruled, and defendant excepted. The defendant also objected to the reading of each item of the bill of costs attached to the transcript, unless it should appear by said transcript that such items had been properly charged, or the services rendered for which they were charged. The objection was overruled; and the court instructed the jury, that the said bill of costs was conclusive evidence of the correctness of the several items contained therein, and of the fact that the services had been rendered; to which also the defendant excepted.

The defendant further objected to several items contained in the bill of costs, because the witnesses whose fees constitused these items were summoned by said Batchelor, and not by Pharr & Beck. This objection also was overruled, and the defendant excepted.

The defendant offered to read to the jury an execution issued in the case of Batchelor v. Pharr & Beck, on which was endorsed a bill of costs, signed by the clerk, for the purpose of showing that the bill of costs attached to said trans-

cript was for too much. Plaintiff objected to the introduction of the execution, and his objection was sustained; to which defendant excepted. This execution is copied in the bill of exceptions, and appears to be signed by the clerk, but is not certified by him.

The defendant asked the court to instruct the jury: 1. That, as the plaintiff had not proved that the clerk had kept a fee book in his office, on which he had entered in regular account the fees due him charged in said bill of costs, they should not find for the plaintiff, for any part of said bill of costs due to said clerk, nor for any sheriff's costs; 2. That, as the plaintiff had not produced, nor offered to produce to the defendant, a bill or account in writing containing the particulars of the fees sought to be recovered, signed by said clerk, they should not find for said plaintiff, for any part of said bill of costs due said clerk.

These charges were refused, and the jury were instructed to find for the plaintiff, for the amount of all the witness fees, and all the other items contained in said bill of costs. The defendant excepted to the charge given, and to the refusal to charge as requested; and now assigns them for error, together with the other matters already stated to which exceptions were taken.

T. H. WATTS and B. J. WHATLEY, for plaintiff in error.
BELSER & RICE, *contra.*

DARGAN, C. J.—The declaration is upon a bond executed by Margaret Batchelor as principal, and the defendant and others as securities, and is subject to a condition to the following effect: "That whereas the said Margaret was prosecuting a suit against Pharr & Beck, to recover for goods sold and services rendered them by the intestate of the said Margaret: Now if she shall prosecute her suit with effect, and pay and satisfy all the cost that may be awarded said Pharr & Beck, and to the officers of the court, then the bond to be void; otherwise to remain in full force and effect." The breach of this condition as set out in the declaration is, that a judgment for costs was rendered in favor of Pharr & Beck, and the amount awarded to them and to the officers of the court

is three hundred and forty-four $67\frac{50}{100}$ dollars, which the said defendant failed to pay, nor had such cost been paid by any one else. To this declaration the defendant demurred, on the grounds that it was not alleged that there was produced, or ready to be produced, to the defendant an account or bill in writing containing the particulars of such fees, and also on the further ground that it was not alleged that the clerk and sheriff kept fee books in which the fees sought to be collected were entered.

Our act, it is true, requires that the different clerks and sheriffs shall keep fee books, in which shall be entered all items of costs or fees due those officers. See Clay's Dig. 237, § 3–4. But we do not think this act can have the effect to alter the rule of pleading as applicable to the bond before us. The general rule is, that it is sufficient if the breach be assigned in the words of the contract, and if the language employed be co-extensive with the condition, and negative its performance, this is sufficient. Chit. Plead. 332–333. But independent of this general rule, the act referred to only requires that those officers shall enter into their books the fees due to them, and not such fees or compensation as may be due to the witnesses in the cause; and this suit is brought to recover all costs. If, therefore, it were even necessary to aver that the fees due the clerk and sheriff were regularly entered in the books provided by law to be kept, still the failure to aver this, in the case before us, would not render the declaration defective, as it seeks to recover all the cost, and not such fees only as were due the clerk and sheriff. A general demurrer, in order to be sustained, must go to the whole declaration, and if the declaration be good to recover a portion of the sum sued for, the demurrer should be overruled; unless, indeed, there may be cases (but as to which we will not stop to inquire) in which the entire amount sued for must be recovered or none. If there be such cases, or if they could be supposed, then, it may be, that if the declaration was imperfect as to a part of the demand, a demurrer would go to the whole action. But this certainly is not the case at bar. Indeed, we think that the breach as assigned, is sufficient to entitle the plaintiff to recover all costs.

We are also of the opinion, that the court did not err in

allowing the transcript of the judgment to be read as evidence, upon the usual certificate of the clerk. The ground of objection was, that the clerk was interested in the result of the suit, he being entitled to a portion of the cost sought to be recovered, and therefore his certificate came from one who could not be examined as a witness, and, consequently, he was incompetent to certify.

This objection would apply to almost every case where the transcript of a judgment, certified by the clerk, was sought to be introduced as evidence in an action of debt, founded on the judgment; for in most of them, the cost of the original suit is sought to be recovered, in which the clerk has, *prima facie* at least, an interest, and if we were to sustain this objection, we would in effect destroy one of the rules by which the record of a judgment may be proved, to wit: by the certificate and seal of the keeper of the record. The test by which the judgment may be proved is, whether it is certified by the proper officer, and in due form. If these requisites appear, then the record is admissible, whether the officer have an interest in it or not.

The next question presented in the course of the argument is this: can a party against whom cost has been taxed, controvert the amount thereof in any other mode than by a direct motion to have the cost re-taxed?

The taxing of cost, it is true, is a ministerial act; at least to this extent, that it is subject to be revised by the court, and corrected if found incorrect. But when the act is done, that is, when the cost is taxed, it then becomes part of the judgment, and may be collected as such, either upon the execution issued on the judgment, or recovered in an action of debt; and if it be a part of the judgment, it must follow that the taxation cannot be impeached, when drawn in question collaterally, either in the court in which the judgment is rendered, or any other. In the case of Brady v. The City of New York, 2 Barbour's S. C. R. 569, the question was directly presented, and the court held, that the taxation of cost was a judicial act, and could not be collaterally impeached. See also Allen v. Hickman, 1 Hals. 409. We think this is the correct rule; and also, that a party who would re-examine the items of cost as taxed, must do so by a direct motion to have

the cost re-taxed, which can be made only in the court in which the judgment was rendered.

It is also insisted, that the fees of the witnesses who were summoned on the part of the plaintiff in the original suit, cannot be recovered in this, because Pharr & Beck could not be made to pay them, and therefore they are not covered by the bond. But we think otherwise. The object of the bond is, to secure the collection of all costs, not only such as the obligee may be compelled himself to pay, but all that shall accrue, and the bond can be put in suit only in the name of the obligee; he, therefore, must recover all the cost, without regard to the question whether he could be made liable to pay all or not. He is a trustee for the benefit of all, and as such, must recover to the extent of all who are designed to be protected by the bond.

The defendant prayed the court to instruct the jury, that, as it had not been proved that the clerk kept a fee book in which all the fees due him had been regularly entered, that such fees could not be recovered; and further, that as it had not been proved that the plaintiff had produced, or was ready to produce to the defendant an account or bill in writing containing the particulars of the fees due to the clerk, that such fees could not be recovered; which charges were refused. The statute we have referred to requires, that the clerks shall keep a fee book, in which they shall enter the fees due them, and also declares, that none of the fees shall be payable until there be produced or ready to be produced to the person chargeable therewith, a bill, or an account in writing, containing the particulars of such fees, signed by the clerk or officer to whom such fee shall be due, or by whom the same is chargeable, &c.

Whether it is necessary, when the suit is on the bond, to produce the bill or account in writing contemplated by this act, or to prove that the officers kept regular fee books, I do not think it is necessary to decide; for there is no plea found in the record, and the presumption is, that none in fact was filed. This is not error after a trial before the jury, when the parties appeared and contested the case as if there had been pleas regularly filed. Lucas v. Hitchcock, 2 Ala. 287; Castleberry v. Pierce, 2 Stew. & Por. 141.

But when no pleas are in fact filed, but a trial is had on the merits, we can only presume that such pleas were filed as went to the merits of the action; that is, such as the general issue, payment, &c. We will not intend that a special plea, that is technical in its character and does not reach the merits of the cause, was filed. In the case before us, we would presume that a plea, showing there was no breach of the condition of the bond or payment, was filed, or perhaps any other plea that would show that the plaintiff had not, and never would have, a cause of action on the bond. But the defence insisted on by the defendant only goes to this action, even if it could be allowed, and would not preclude the bringing of another suit for the same fees, after they had been regularly entered in the fee book, and a bill of them produced and rendered to the defendant. This defence, then, is a purely technical one, and we cannot presume that it was presented by a special plea. If it had been, in all probability it would have been, or at least it could have been, disproved, and as it was not, the plaintiff was justified in supposing that the grounds of defence relied on, went to the merits of the action only; and to allow the defendant to take advantage of the non-production of proof, when he had not required it by a special plea, would be to allow him to take advantage of his own neglect. If he intended to insist on this defence, he should have pleaded it specially; as he did not, the plaintiff might well consider that it was waived.

The last question we propose to examine is, whether the court erred in rejecting the execution as evidence, which was offered by the defendant to show that the cost was less than it appeared to be in the certified transcript.

Although a judgment is conclusive between the parties as to every fact decided by it, yet the the certified transcript is only *prima facie* evidence of the judgment itself. For instance: suppose the judgment be for one hundred dollars, and the clerk by mistake should make out a transcript showing it to be for two hundred, the defendant would not be precluded from showing the true amount; such proof would not controvert any fact determined by the judgment. This, I think, may be done either by introducing a transcript for the true amount, certified by the same officer, (and it would then be

for the jury to decide which was the correct transcript) or it might be done by copies connected with parol proof that such copies were correct. The only question on this branch of the case, therefore, is, was the execution properly certified by the clerk, or did it appear to be the original execution itself, which had become part of the record. The execution is signed by the clerk, but it is not certified by him; it therefore could not be received as a transcript regularly certified by the keeper of the record, and there is nothing upon the instrument itself to show that it is the original, or that it is a part of the record. It is issued against Margaret Batchelor and all her securities for cost, when the judgment for cost is against her alone. It does not appear ever to have been put in the hands of the sheriff. We, therefore, cannot hold it to be the original execution which has become part of the record; nor is it a transcript proved or certified; consequently it was properly rejected.

We can perceive no error in the record of which the plaintiff in error can complain, and the consequence is, that the judgment must be affirmed.

CHILTON, J., did not sit in this cause.

WEST *vs.* FOREMAN.

1. A written order in the following language, viz: "Messrs. C. & M., attys—Please pay D. W. two hundred and ninety three dollars and seventy-five cents, and all interest on the same, the demand I have against the estate of D. Y., deceased. Sept. 11, 1843," is neither a bill of exchange, nor such a written instrument for the payment of money, as, under the statute of this State, may be assigned, so as to entitle the assignee to sue on it in his own name.

ERROR to the Circuit Court of Perry.

Tried before the Hon. GEORGE GOLDTHWAITE.

ASSUMPSIT, by Foreman, as endorsee of Daniel West, against the plaintiff in error, on a written order, in the following

words: "Messrs. Crook & Moore, attys. Please pay Daniel West two hundred and ninety-three dollars and seventy-five cents, and all interest on the same, the demand I have against the estate of David Yarbrough, deceased. Sept. 11. 1843. Willis L. West."

The defendant demurred to the declaration, but his demurrer was overruled. He also asked the court to charge the jury, "that said instrument in writing did not show a good cause of action in plaintiff," which was refused. The overruling of the demurrer, and the refusal to charge as requested, are now assigned for error.

I. W. GARROTT, for plaintiff in error:

The court erred in overruling demurrers of plaintiff in error, and in refusing to charge the jury, as shown in the bill of exceptions. The demurrer and refusal to charge present the same question, to-wit: "Did the plaintiff below have a right of action in his own name on the instrument in writing set out in the record?" If he did, the ruling of the court was right; if he did not, its ruling was wrong, and the judgment must be reversed.

The instrument sued on is not a bill of exchange, but a mere authority to Daniel West, by which he was empowered and requested to receive a certain sum of money from Crook & Moore, attorneys. It is addressed to Crook & Moore, attorneys, ("attys."), not as individuals. It authorizes Daniel West, and no other person, to receive the money. It is not payable "to the order" of said West, or to said "West or bearer." The particular fund which Messrs Crook & Moore, attorneys, were requested to pay over to said West, is specicified, to-wit: "the demand I have against the estate of David Yarbrough, deceased," and it is not given for value received. If a doubt could be possibly generated as to the meaning of this instrument, such doubt would be utterly annihilated by the statement of plaintiff below, in the first three counts of his declaration, where it is expressly averred that the amount was a "particular fund." The instrument sued on not being negotiable, the endorsee cannot maintain a suit on it in his own name. Waters v. Carleton, 4 P. 205; Chitty on Bills, 42 to 46, notes, 157–8; Story on Bills, § 46;

Atkinson v. Manks, 1 Cowen, 691, 706; Cook v. Satterlee, 6 Cowen, 108–9; 1 U. S. Dig. 420 §§ 18, 19, 24; 1 Sup. U. S. Dig. 288, §§ 9, 10, 11; ib. 289, §§ 18, 22, 23, 27, 28; Nichols, Adm'r. v. Davis, Agent, 1 Bibb, 490; Mershom v. Withers, ib. 503; 9 Ann. U. S. Digest. 77, §§ 7, 8; Strader v. Bachelor, 8 B. Monroe, 168; Dawkes & Wife v. De Loraine, 3 Wilson, 207; Jenny v. Herle, 2 Raymond, 1361; Luff v. Pope, 5 Hill, 413, 417–8.

JOHN, and A. B. MOORE, *contra:*

This action, being founded on an order in writing, directing the payment of money in the hands of another person, authorized the payee, Daniel West, to institute a suit against the drawer after non-acceptance. Clay's Dig. 381, § 3.

The instrument upon which this suit is predicated, is made negotiable by statute, (Clay's Dig. 381, § 6); and the same being assigned to plaintiff, he had the right to bring suit in his own name against the defendant below. Clay's Digest, 381, § 6.

In this case, the order was payable absolutely, and without contingency; and the words added are inserted merely for the purpose of designating to the drawee how he may reimburse himself, and will not vitiate the order. 8. B. Monroe, 170; 3 Marsh. 185; 2 Greenl. 123; Chitty on Bills, 158, 159, and notes; Story on Bills, § 47.

Bills should be liberally construed, so as to make them effectual, if practicable. 3 Hill 132.

CHILTON, J.—Assumpsit on a writing as follows: "The State of Alabama, St. Clair County. Messrs. Crook & Moore, attys. Please pay Daniel West two hundred and ninety-three dollars and seventy-five cents, and all interest on the same, the demand I have against the estate of David Yarbrough, deceased. 11th Sept. '43. Willis L. West."

The plaintiff, in his declaration, declares upon this as a bill of exchange in two counts; sets it out in *hæc verba* in the third, and in the fourth calls it an order, by which said West directs Messrs. Crook & Moore, attys., to pay, &c. The declaration also avers, that the plaintiff below was the endorsee of Daniel West, the party to whom the instrument was given.

The defendant demurred to the declaration, but his demurrer was overruled. He then asked a charge from the court, denying the right of the plaintiff to recover, but this was refused. He now insists, that the instrument is neither a bill of exchange, nor such a writing for the payment of money, as, under the statute of this State, is the subject of assignment, so as to entitle the assignee to sue in his own name.

It is clear, from the authorities cited by the counsel for the plaintiff in error, that this is not a bill of exchange. To say the most of it, it is a direction given to the attorneys to pay to Daniel West the sum of two hundred and ninety-three $\frac{75}{100}$ dollars, out of the fund collected, or to be collected, upon the demand which Willis West had against the estate of D. Yarbrough; and, considered in this aspect, it would not be a bill of exchange. It is drawn upon a particular fund, and not upon the general credit of the drawer. The claim against the estate of Yarbrough is clearly not mentioned as a fund out of which the drawees are to reimburse themselves, but as the fund drawn for. The just and fair construction of the instrument is, that the drawer had a demand in the hands of Crook & Moore, as attorneys, against the estate of Yarbrough; that he gave this order to the attorneys to pay it over to Daniel West. They are directed to pay him $\$293\frac{75}{100}$, with all interest, the demand which he then had against the estate of said Yarbrough: that is, the attorneys are requested to pay over this demand to the payee, amounting to $\$293\frac{75}{100}$, with the interest. The term "demand," as used in the instrument after the ellipsis, is put in apposition with the $\$293\frac{75}{100}$ in money, and means that the money ordered to be paid over is the amount or proceeds of the demand against Yarbrough's estate.

Being, therefore, a direction given to the attorneys to pay over the proceeds of a demand in their hands to the payee, the instrument does not fall within the statute authorizing notes, bills, bonds, and other instruments for the payment of money, to be assigned. The decision of our predecessors, in the case of Waters v. Carleton, 4 Por. 205, is an authority in point, to show that the plantiff had no title by his endorsement, and that this was not such an instrument as authorizes a recovery upon it. See, to the same point, the authorities

cited by the counsel for the plaintiff in error, and, also, Crawford v. Cully, Wright, 453; Van Vacter v. Flack, 1 Smedes & Mar. 393; Carle v. Beers, 3 J. J. Mar. 170; Chitty on Bills, 11 Amer. from 9th Lond. ed. 137, and notes.

As this view is decisive of the case, it is unnecessary to notice the other points. The judgment must be reversed, and the cause remanded.

GOLDSTICKER *vs.* STETSON & CO.

1. A variance between the writ of attachment and the bond and affidavit, if available at all to the defendant, can only be taken advantage of by plea in abatement.
2. A plea in abatement which concludes in bar is bad on demurrer.
3. Where a plea in abatement of a variance sets out the attachment, bond and affidavit, but does not crave oyer of them, it is bad on demurrer.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. L. GIBBONS.

Stetson & Co. sued out a writ of attachment against Goldsticker for $\$557\frac{60}{100}$, as stated in the writ. The defendant below filed his plea in abatement, setting out, without craving oyer, the affidavit, the bond, and attachment. The affidavit thus set out, states the amount of the debt to be $\$257\frac{60}{100}$, and the bond is for $\$515\frac{20}{100}$. The plea concludes, "Wherefore he says that the said writ was by the said plaintiffs wrongfully and unlawfully issued, without a proper bond and affidavit, as is required by the statute in such cases made and provided, and that they ought not to charge the said defendant thereby, and this he is ready to verify, &c., wherefore he prays judgment, &c." To this plea there was a demurrer, which was sustained by the court.

The defendant refused to plead over, and judgment was given for the plaintiffs.

The case is brought here on writ of error for revision, and

the judgment on the demurrer and the final judgment are assigned as error.

STEWART, for plaintiff in error:

The error in this case is, that Stetson & Co. sued out an attachment for the sum of $557\frac{66}{100}$, when the same was not warranted by a sufficient affidavit and bond.

The bond and affidavit were for a debt of $257\frac{66}{100}$ only. But the attachment was for a much greater debt. The consequence was, that a levy was made for the whole amount of the false debt mentioned in the writ, and the defendant was compelled to give security in a bond for the sum of $1,115\frac{20}{100}$, when the debt sworn to was only $257\frac{66}{100}$.

The proper manner of taking the objection to this oppression and irregularity, is by the statute declared to be by plea in abatement.

The proper plea in abatement was filed, and the plaintiff demurred to it. The judge sustained the demurrer, on the ground that the objection could not be taken in abatement.

In this, the court very clearly erred, as we contend, and as to this we refer to the statute, and also to Clay's Dig., p. 55, sec. 3; Jones v. Pope, 6 Ala. 154; Kirkman v. Rosser, 19 Ala. 32.

PHILLIPS, *contra:*

Slight or formal defects and irregularities in proceeding by attachment will be amended. Pearsall & Stanton v. Middlebrook, 2 S. & P., 406.

If the bond was defective, this would not abate the suit. Lowry v. Stowe, 7 P. 483; P. & M. Bank v. Andrews, 8 P. 251; Alford v. Johnson, 9 P. 320; Jackson v. Stanley, 7 Ala. 327.

The mere errors which have crept into the proceedings in stating the amount of the indebtedness, will not vitiate them. If the defendant has been injured, he would have his remedy by trespass.

LIGON, J.—The case of Banks v. Lewis, 4 Ala. 599, is so analogous to the present, that it must control its destiny.

There, as here, the plea in abatement was not drawn with that technical nicety which the courts require in dilatory pleas.

The plea here contains matter which, if available at all, is only so in abatement, and it concludes rather in bar, than in abatement; and for this reason, it is bad on demurrer. 4 Ala. 599; 2 Por. 249.

The variance of which the defendant complains, could only be brought to the knowledge of the court by setting out the affidavit and bond on oyer. Here, although they appear in the plea, the plea does not so set them out on oyer technically craved. For this reason, also, the demurrer was rightly sustained. Banks v. Lewis, *supra.*

There is no error in the record, and the judgment must be affirmed.

CHIGHIZOLA *vs.* LE BARON, EXECUTOR.

1. Where a testator devises and bequeaths to his children a certain portion of his real estate and all of his personal estate, "to be distributed when required, at mature age or majority, in equal parts," the authority to make distribution confers upon the executor a naked power merely, uncoupled with any interest, and, in the absence of a devise to him or words of implication, gives him no right to the possession or control of the lands.
2. In such case, the word "distributed" simply postpones the division of the estate to the time fixed by the will; and until that time arrives, and the real estate is divided, the devisees take as tenants in common.
3. The statutes of this State authorizing an executor to sell or rent the lands of the testator do not, of themselves, intercept the passing of the estate to the heirs or devisees, who may assert their title, with all its incidents, until the executor exerts the power reposed in him by the statute.
4. The power to rent, conferred by statute upon the executor, is a bare authority, and must be strictly pursued; and if the lands are not leased at public outcry, according to the requisitions of the statute, it cannot be regarded as a due execution of the power, and does not in any manner affect the rights of the devisees.
5. Where the same clause of a will contains both a devise and a legacy to the children of the testator, "to be distributed when required, at mature age or majority, in equal parts," and present words of bequest are used, the word "distributed," with reference to the personal property, will be construed as synonymous with "divided," and as postponing, not its distribution, but its division among the legatees, until the period fixed by the testator.

6. The statute authorizing "any person entitled to a legacy or any estate by will," to proceed against the executor after the lapse of eighteen months, (Clay's Digest, 196, §§ 23, 24,) was not intended to apply to devises of which the executor had no control, and in relation to which he had exercised none of the powers conferred on him by law; and in such case the executor cannot, under the statute, be held responsible in his representative character for the rents or possession of the land, the subject of such devise.
7. When an executor, in his answer to a citation requiring him to make distribution and a final settlement, alleges "that suits are pending against him as executor," but does not give any statement or description of them, nor refer to any record or schedule of them, the answer is insufficient, and demurrable for that reason.
8. The proper practice, however, in such case, would be, to raise the objection by exceptions to the answer, rather than by demurrer.

APPEAL from the Court of Probate of Mobile.

On the 25th April, 1852, Clara Chighizola filed her petition in the Court of Probate, in behalf of herself individually, and as guardian of Anna Chighizola, Louisa Chighizola and John Baptiste Chighizola, who were her children and minors, propounding her own interest, and that of her said children, in the estate of her late husband, Goakomo Chighizola, under his last will and testament; and praying for a citation against Charles Le Baron, who is alleged to have qualified as executor on the 21st February, 1850, and to have collected the estate and paid all the debts of the testator, requiring him to make a final settlement of the estate, or show cause why he should not. The petitioner further prayed, that her individual share of the estate under the will might be delivered into her possession, and that the shares of the said minor children might also be delivered into her possession, as their guardian. Copies of the will, of the letters testamentary, and of guardianship are annexed to the petition.

A citation was thereupon issued to the executor, in accordance with the prayer of the petition. He appeared, and filed his answer in writing, denying that he had had sufficient time to collect the estate of the testator, and to pay his debts, and alleging that suits were then pending against him as executor, on account of which he could not then come to a final settlement. He also insists in his answer, that, by the terms of the will, he was required to retain the estate in his possession, until the said children of the testator should attain the age of majority; that the said estate consisted principally of

real estate, and, believing that it was his duty to keep it in his possession by virtue of the will, he had leased out the whole of the real estate to various persons, a part until the first day of November next thereafter, and a part for a term of years; upon which leases he was individually responsible to the lessees on the covenants therein contained, as well as liable to the heirs of the testator for the rents of the estate. The answer also resists distribution on other grounds, which it is unnecessary to notice, as they were not relied on in the Appellate Court. This answer was sworn to, and at the bottom of the affidavit is appended a list of the suits then pending against the executor.

The petitioners then tendered to the executor a refunding bond, to cover the outstanding debts against the estate. They also demurred and excepted to the answer, "in short by consent, for uncertainty and for insufficiency." The demurrer was overruled, and judgment was rendered, discharging the executor. The petitioners prayed an appeal from this judgment, and now assign for error the overruling of their demurrer to the answer.

REQUIER and JOHN T. TAYLOR, for the appellants:

1. A party appointed guardian in a will, is the custodian of property as well as persons of minors. Clay's Dig. 269, 10 and 11.

2. The admission of the fact alleged in the petition, that the executor has had the estate more than two years in his possession, is an admission, under the statute, that he has had ample time to collect the estate and pay the debts of his testator. Clay's Dig. 196, 23 and 24; 6 Porter 23. In case of a contingent debt, a legatee will be entitled to the assets, on giving security to refund if the debt become absolute. 8 Porter 396. The functions of an executor do not necessarily cease with the final settlement of the estate. 3 Ala. 389.

Neither the common nor statute law gives an executor *virtute officii* a right to the possession of the testator's lands. 8 Porter 380. Since that decision, an act has been passed conferring on the executor the special power of renting lands at public outcry; but the defendant has never pursued this act. Clay's Dig. 199, 36. The guardian is the more proper

person to litigate suits about realty. The only interest of the executor in the realty is, to subject the rents as assets. The only right he could have to appear would be, to defend his rents; but unless he acquires title by renting "at public outcry," he cannot be entitled to the rents. If he rents in any other way, his leases are void, and he cannot collect the rent, but the heir has the better title. 18 Ala. 190.

The act (Dig. 199, 36) gives power to lease the estate at public outcry "until final settlement"—not for a term of years. If he had rented in a proper manner, his leases should pursue the act, and could not bind him beyond our settlement. Again, if all things had been regular, he could make no special covenants to bind the estate, except the incidental one that the property should be kept "tenantable." Minor 276; 2 Porter 33; 4 Ala. 50.

3. The direction in a will, that property shall not be distributed among minor devisees until they become of age, is no bar to a suit by their guardian to obtain possession of the same; *a fortiori* when the guardian is appointed by the testator. 8 Porter 204; 5 Ala. 144. There is no trust in this will. 16 Ala. 14; Clay's Dig. 199, 36; ib. 228, 39.

It does not appear from the terms of the order, that the estate is to be "kept together for distribution at a future day," (the order speaks of realty merely) and as these words are the statutory definition of the cases in which only the statute authorizes such orders, the order appears, upon its face, not to have been granted under that statute.

The order does not require the executor to keep the estate in his possession for an indefinite period of time, i. e., forever; nor indeed to keep it for any time at all; but merely grants a salary from a certain date, leaving the period, during which the party shall be entitled to receive it, entirely unascertained.

5. If he is responsible to the lessees on his covenants, and to the heirs for the collection of rents, it is his fault—not his misfortune. Clay's Dig. 199, 36; 18 Ala. 190.

JOHN A. CAMPBELL, *contra:*

The period appointed for the distribution of the estate of the testator, by the terms of his will, is ascertained. There is no clause in the will that controls or alters this date, so as

to raise the presumption that an earlier day was designed. The law makes it the duty of the executor to effect distribution, and for that purpose the control of the property is vested in him. Where no person is mentioned who is to do an act, the executor is the proper person for that purpose. 10 B. Monroe 273; 5 Ired. Eq. 12.

2. In this case there is a plain separation of the interests of the wife from that of the children. She is entitled to take at once, and the legacy is held to be for her use. In the case of the children, the period of distribution is postponed to a distant period. There is no indication of a purpose that the property shall remain with a guardian in the mean time.

3. The placing the property in the hands of guardians necessarily occasions a distribution. The guardian accounts to each, and not to the children collectively.

4. The cases in the Alabama courts sustain our views. Whenever the period of distribution has been fixed by the will, the executor has been allowed to hold the estate till that time. The courts have, on two occasions, found expressions in a will controlling a clause which apparently fixed such a period. The court has recognized the general rule in such cases. 8 Porter 204; 8 Ala. 688; 5 Ala. 144; 6 Ala. 236.

GOLDTHWAITE, J.—The testator, by his will, devised certain lands to the children of a deceased son. The other clauses of the will are as follows:

"I give and bequeath to my wife Clara one-fourth of the income of all the rest of my real estate during her natural life, and the entire use of my present residence, on Conti street, and one-fourth in fee simple of all my personal estate for her use."

"I give and bequeath to my children Anna, Louisa, and son John Baptiste, the balance of my real estate not already bequeathed, and also all my personal estate, to be distributed when required, at mature age or majority, in equal parts."

The wife is appointed testamentary guardian of the children, and the defendant in error, executor.

The first question presented in the argument, was in relation to the right of the executor to the possession of the real estate devised to the children. By the common law, the

lands of the testator not devised descend to the heir, and if devised, they pass to the devisee; the heir in the one case, and the devisee in the other, being entitled to the possession. To disinherit the heir at law, plain words of devise or necessary implication were required, and his title could not be defeated, unless there was a disposition of the subject, to some person capable of taking. 2 Fonb. 51; Habergham v. Vincent, 2 Ves. 224; Pickering v. Lord Stamford, 3 Ves. 493. So also in relation to the executor; at the common law, he was not entitled to the possession of the lands without a devise to him, or unless his right to hold was clearly deducible from the will. In this case there is no devise to the executor; but it is insisted that his right to the possession of the lands, results by necessary implication from the fact, that, by the terms of the will, the distribution of the estate to the children is postponed until a future period; and that, as the law casts upon the executor the duty of distribution, it gives him by implication the control and possession of the estate for that purpose. If the position insisted on was correct, it would follow, that where the testator directed his executor to sell his land at a future day, he would be entitled to hold until the period fixed for the sale; whereas the rule is well settled, that such a direction amounts to a bare authority only, without an interest, and that in the mean time the heir is entitled to the possession. Co. Litt. 113 a, 236 b; Powell on Devises, 193; Bergen v. Bennett, 1 Caines' Cas. 15, 16. So in the present case, the authority to make distribution confers upon the executor a naked power merely, uncoupled with any interest, and, in the absence of a devise to him, or words of implication, gives him no right to the possession or control of the lands. We regard, however, the word "distributed," as used by the testator, intended simply to postpone the division of the estate to the time fixed by the will, and until that time arrives, and the real estate is divided, the devisees referred to take as tenants in common.

We have considered the question presented, upon the analogies of the common law, and without any reference to the statutes of this State, authorizing the executor or administrator to sell or rent the lands of the decedent—the rule being settled, that these statutes do not, of themselves, intercept the

passing of the estate to the heirs or devisees, who may assert their title, with all its incidents, until the personal representative exerts the power reposed in him by the statute. Leavins v. Butler, 8 Por. 380; Masterton v. Girard's Heirs, 10 Ala. 60. As the power to rent is but a bare authority, it must be strictly pursued; and as the lands in the present case were not leased at public outcry, according to the requisitions of the statute, it cannot be regarded as a due execution of the power, and does not in any manner affect the rights of the devisees. Martin v. Williams, 18 Ala. 190. Neither would the taking possession of the lands by the guardian necessarily occasion a distribution, as seems to have been supposed by the counsel for the defendant in error. The legislature have met this case by the act of 1849–50, the thirty-second section of which provides, that whenever any person shall apply for letters of guardianship as regards one or more minors, having estates undivided, and derived from the same source, although as legatees, distributees, or otherwise, the same shall be granted so as to include all the minors in the same letters; the inventories, returns and settlements to be made as though there was but one ward. Acts 1849–50, 34, 32.

In relation to the legacies bequeathed to the children, if they had not been blended together with the devise, by their insertion in the same clause of the will, and the application of the same words to each, we should be of opinion that, as the title to the personal property vests in the executor, and the term "distributed," when applied to that kind of property, refers to the time when the parties entitled would have the right to the possession, the legatees could not claim the possession until the period fixed by the will; but as it is, we are clear that the intention of the testator must have been the same in relation to both his real and personal estate, given by the same clause and the same words, and as present words of bequest are used, we can, without straining, construe the term "distributed" with reference to personal property, as synonymous with divided, and as postponing, not its distribution, but its division among the legatees until the period fixed by the testator.

It follows, from the construction we have given to the will, that as the children were entitled to both the real and per-

sonal property, without waiting until the time to which the division was postponed, the guardian was entitled, after the expiration of eighteen months from the grant of letters testamentary, to call upon the executor for the share of the personalty to which she was entitled in her own right, as well as the undivided three-fourths bequeathed to the children. She, however, could only pursue the statutory remedy, in relation to property which, under the will, it was the duty of the executor to administer. The statute (Clay's Dig. 196, § 23, 24) was not intended to apply to devises of which the personal representative had no control, and in relation to which he had exercised none of the powers conferred upon him by the statute. So far as these matters are concerned, he stands not as the executor, but as a stranger; and although, perhaps, the guardian of the devisees could, as such, confirm his acts as to the leases made, he might also repudiate them altogether, and proceed against the persons in possession. Masterton v. Girard's Heirs, *supra*. They cannot, however, hold the executor responsible for the rent or possession of lands, in his representative capacity, under the act last referred to, when, under the will, he has no power to act in reference to such lands, and has exercised none of the powers conferred upon him by the laws of this State.

In relation to the proceedings in the Probate Court, the question is, whether such court erred in sustaining the demurrer to the answer of the defendant in error. The petition is not only for distribution, but a final settlement; and the facts alleged in the answer would not constitute a full defence, as, under our decisions, although the legatees, or either of them, were entitled, after eighteen months from the grant of letters testamentary, to call upon the executor for a settlement of the estate and distribution; yet, on the hearing, it was competent for the executor to show cause, both against the final settlement and distribution, or against the former only. Sanky v. Ellsberry, 10 Ala. 455. The only ground set forth in the answer which would prevent a final settlement, is, the allegation that suits were pending against the defendant in error as executor; and as these suits are not set out in the answer, and no reference whatever made to the records, or to any schedule which describes the claims on which

they are founded, we cannot regard what follows the affidavit, purporting to be a statement of certain claims, as any part of the answer. The mode of proceeding in the Probate Court, however, should have been by exceptions to the answer, rather than by demurrer; and had there been a single ground properly alleged by the defendant in error, the demurrer would have been correctly overruled; but as the answer was wholly insufficient, and as no objection was made in the court below to the determination of its sufficiency in the mode adopted by the parties, we must determine that the court erred in overruling the demurrer.

The judgment is therefore reversed, and remanded.

GEYER (TRUSTEE) *vs.* BRANCH BANK AT MOBILE.

1. A deed of trust executed by a woman in contemplation of marriage, conveying all her property, consisting of bonds and mortgages, to a trustee, "to have and to hold," &c., "in trust for and during the joint lives of" herself and her intended husband, "to and for their joint use, benefit and behoof, and to suffer and permit them to have, take and receive the issue, income, interest and profits arising from the said bonds and mortgages, to and for their joint use and benefit, without being in any manner subject to the debts, contracts or control of" her husband, does not exclude the marital rights of the husband, but the property may be taken in execution at law for his debts.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. JOHN BRAGG.

This was a trial of the right of property, under the statute, to a certain slave, between Geyer, as trustee, and the Branch Bank at Mobile.

It was admitted in this case, that the negro slave levied on was purchased with the money raised from the bonds mentioned in the deed of trust, (to which further reference will be made hereafter,) made in contemplation of marriage between defendant in execution and Miss Bonneau; that the slave was in the possession of John S. Geyer, the defendant in execution, at the time of the levy, and under his control

and management, claiming to hold as trustee; that Mrs. Geyer, who is mentioned in the deed as Miss Bonneau, is still living; that the slave was of the value of $600; and the case was submitted on the sole question, whether the deed gives Mrs. Geyer a separate estate, not subject to the debts of her husband, John S. Geyer.

The deed under which the trustee claims, is a deed made by Miss Bonneau, in contemplation of her marriage with John S. Geyer, by which she conveys all her property, consisting of bonds and mortgages, to John E. Bonneau, as trustee. By the terms of the deed, the trustee is to hold the property in trust for her sole use until the marriage. After the marriage, he is to hold it, in the words of the deed, "in trust, for and during the joint lives of them, the said John S. Geyer and Esther E. Bonneau, to and for the joint use, benefit and behoof of them, the said John S. Geyer and Esther E. Bonneau, and to suffer and permit them to have, take and receive the issue, income, interest and profits arising from the said bonds and mortgages, to and for their joint use and benefit, without being in any manner subject to the debts, contracts or control of the said John S. Geyer." The deed then provides, that, if she survives him, the property is to be for her sole use; but if he survives her, then it is to be subject to such limitations as she may by will appoint, and in default of any will by her, then, and if she dies leaving no issue living, one-half of the property to her husband, and the other half to the children of Wm. H. Bonneau; if she dies leaving issue, then to her husband for his natural life, and, after his death, to the said issue, in equal shares. The deed gives to the trustee power, with the consent of Geyer and his wife, to sell and reinvest; and to Geyer and his wife, to nominate and appoint a new trustee, in case it becomes necessary.

The court below, on the question submitted, decided, that, under a just construction of the terms of this deed, the slave in controversy was subject to the debts of the plaintiff in error, and gave judgment accordingly. This decision of the court is assigned for error.

A. F. Hopkins, for plaintiff in error:

As the object of the deed was, to make a settlement on

the wife of her own estate, it must have been intended that the deed should secure a benefit to her. 1 Dess. Eq. R. 443. As the interest of the husband, in the joint use created for his wife and himself, is inseparable from the wife's interest in the same, the slave cannot be subject to his debts. Lavender et al. v. Lee, 14 Ala. 688. His claim to a separate interest is contingent, and can arise only from the death of his wife before him without leaving a will bequeathing the property to some other person.

In the case of Hughes v. Pledge et al. 1 Leigh, 443, the Court of Appeals of Virginia held, that such an interest of the husband, in a joint use created by a marriage settlement of the wife's property, could not be subjected to his debts. The trusts of the deed of settlement in this case are precisely such as those contained in the settlement in that case. The legal title to the slave is in the trustee, and no equitable interest of the husband in the slave is liable for his debts under execution at law. 1 Speer's Eq. R. 648.

The effect of the judgment of the court below is, that the whole property in the slave belongs to the husband, and is liable for his debts. This is erroneous; because, his interest would have terminated upon his death before her, or upon her death before him leaving a will, by which she bequeathed the property to another.

JOHN T. TAYLOR, *contra:*

The case of Pollard v. Merrill, 15 Ala. 169, and the cases there cited, are conclusive of the question presented here as to the construction of the marriage settlement.

All other questions are waived by the written consent of the counsel.

PHELAN, J.—The provision of the deed in trust in this case, under which the property was held to be subject to the debts of the husband, cannot, I think, be distinguished, in substance, from the provision of the deed in the case of Pollard et al. v. Merrill, 15 Ala. 169.

The words of the deed in the Pollard case were these: "To have and to hold, &c., for the separate and exclusive use, benefit and maintenance of the said Sarah Ann Webb and

the said Wm. H. Pollard, during their joint lives, in no wise liable or subject to him, the said Wm. H. Pollard, or to the payment of any of his debts or liabilities now or hereafter existing."

The words of the deed in this case are, in fact, hardly so strong in favor of the wife. They are as follows: "To have and to hold, &c., in trust, for and during the joint lives of them, the said John S. Geyer and Esther E. Bonneau, to and for the joint use, benefit and behoof of them, the said John S. Geyer and Esther E. Bonneau, and to suffer and permit them to have, take and receive the issue, income, interest and profits arising from the said bonds and mortgages, to and for their joint use and benefit, without being in any manner subject to the debts, contracts or control of the said John S. Geyer."

Upon placing the clauses from the two deeds in juxtaposition, it will be seen that they are so strictly alike, in their most material features, that I do not deem it necessary to do more than refer to the reasoning of the court in the case of Pollard, and the authorities there cited, and to say that the judgment below, in this case, is affirmed on the authority of that case.

SPIVEY *vs.* McGEHEE ET AL.

1. In debt on bond, executed in pursuance of an order of the Chancellor, as a condition precedent to the issuing of a *ne exeat*, the condition of which is, that the plaintiff in the writ shall prosecute his suit and writ to effect, or, failing therein, shall pay or cause to be paid to the defendant "all such costs and damages as he may sustain from the *wrongful* suing out of said writ," the plaintiff can only recover for the damages *actually* sustained by the wrongful suing out of the writ, and not such damages as he might recover in case if the writ had been sued out *maliciously;* the writ may have been sued out wrongfully, and yet without malice.
2. But the plaintiff cannot recover upon proof merely that the *ne exeat* was wrongfully sued out; he must also show, that the writ was not prosecuted to effect within the meaning of the bond.
3. Error without injury will not reverse a judgment; but error raises the pre-

sumption of injury, and unless this presumption is repelled beyond doubt, the cause will be remanded for another trial.

4. The Appellate Court will not look to grave and doubtful questions, which are not raised by the assignment of errors, and are not connected with the question in which the error is found, for the purpose of deciding that the error did not work injury.

ERROR to the Circuit Court of Pickens.
Tried before the Hon. E. PICKENS.

The facts of this case all appear from the opinion.

RICE & MORGAN, and J. E. BELSER, for plaintiff in error:

1. In an action on the bond, for the wrongful suing out of the writ of *ne exeat*, the plaintiff is not bound to show malice, nor can the defendant rely, by way of defence, upon probable cause. Petit v. Mercer, 8 B. Monroe's Rep., 51; Cox v. Taylor, 10 ib. 17.

2. The charge of the court below is clearly erroneous, in directing the jury to "find for the defendant, unless they believed, from the evidence, that the writ of *ne exeat* was sued out maliciously." Such is not the law, when the suit is on the bond.

3. This case is much stronger in favor of the plaintiff, than the case of the mere wrongful suing out of an attachment. The attachment deprives the party of his property. The *ne exeat* deprives him of his liberty. The law values the liberty of the citizen more highly than his property.

N. W. COCKE, *contra:*

I. There is no error in the charge of the court;

1. Actions on bonds, to indemnify against the wrongful acts of the obligors, are governed by the same rules that apply to actions on the case for the injury sustained. Hill v. Rushing, 4 Ala. 212.

2. In the absence of any statute, providing for the execution of a bond and prescribing the condition thereof, as is the case here, in an action on such bond it is necessary to aver and prove malice; otherwise, the action cannot be maintained. Browne on Actions at Law, 371; Vandúzor v. Lindeman, 10 Johns. 106; White v. Dingley, 4 Mass. 433; Lindsay v.

Larned, 17 ib. 190; Williams v. Hunter, 3 Hawks, 545; Kirksey v. Jones, 7 Ala. 622; Long v. Rogers, 19 ib. 321; Garrett et al. v. Logan, ib. 344.

II. But if there be error in the record, it is error without injury; for the plaintiff never can recover in this action.

1. The prayer of the bill was for a writ of *ne exeat*, &c. "to seize and take into custody the body of Eli B. W. Spivey, until he deliver to the sheriff all of the said slaves in said mortgage mentioned," &c.; "unless he, the said Spivey, shall execute to your orators a bond, in a sufficient penalty, with sufficient security, conditioned according to law."

2. The recital and condition of the bond are, that, "whereas, it is ordered," &c., "that a writ of *ne exeat* do issue to restrain the said Spivey from removing beyond the jurisdiction of said court: Now, if the said complainants in said bill shall prosecute said bill and writ to effect," &c.

3. The fiat of the Chancellor directed the register, "upon the complainants, or either of them, entering into bond with three good and sufficient securities, in the sum of twelve thousand and two hundred dollars, and payable to said Eli B. W. Spivey, and conditioned according to law," to issue the process, "according to the prayer of the bill."

4. The writ issued by the register commands the sheriff to "take the body of Eli B. W. Spivey, and him safely keep in custody, until he shall deliver up into your hands the aforesaid negroes," &c., or until he enter into bail or security to the said complainants, in the sum of twelve thousand and two hundred dollars, with three or more good securities, conditioned according to law."

The latter portion, quoted from the prayer of the bill, was doubtless inserted by the pleader, under some obscure idea of the provisions of the statute, Clay's Dig. § 63, p. 355, and was not intended, nor can it be construed to mean, a *ne exeat*, to restrain Spivey from removing his person beyond the jurisdiction of the court. Nor can the alternative of the writ issued be so construed, because such a construction would render it inconsistent with the fiat. But if such be the construction, it is void, not only because it is unauthorized by the fiat, but because it is a nullity in itself. There is no law or statute, prescribing the condition or the penalty

of the bond to be given by the defendant, when arrested under a new *exeat.* The statute (Clay's Dig. § 24, p. 349) provides, that the Chancellor, by whom a *ne exeat* is granted, shall endorse thereon the sum and number of securities required from the defendant.

The writ issued, then, was simply a writ for the arrest and detention of Spivey, until he delivered up the negroes, or gave bond for their forthcoming. No other sensible construction can be placed upon the process. The bond is to indemnify against damage from the wrongful issuance of a *ne exeat,* restraining the removal of Spivey beyond the jurisdiction of the court; and the securities, at least, cannot be made liable for the issuance of a writ, or injury resulting from the execution of a writ, not embraced in the bond. Hurlestone on Bonds, 57 to 60, top page, (9 Vol. Law Library.)

DARGAN, C. J.—This was an action of debt, commenced on a bond executed by McGehee and others, in pursuance of an order of the Chancellor, granted upon the application of McGehee, as a condition precedent to the issuing of a writ of *ne exeat* against the plaintiff.

The condition of the bond, after reciting the filing of the bill, the prayer for a *ne exeat,* and the fiat of the Chancellor, proceeds as follows: "Now, if the said complainants shall prosecute their said bill and writ to effect, or, failing therein, shall pay, or cause to be paid, to the said Spivey, all such cost and damages as he may sustain from the wrongful suing out of said writ, then the bond to be void," &c. On the trial, as we are informed by the bill of exceptions, the plaintiff introduced proof tending to show, that he had sustained actual damages, and that the writ was sued out maliciously; but on this latter point the evidence was conflicting. The court charged the jury, that, unless they believed from the evidence that the writ was sued out maliciously, the plaintiff could not recover; but that they might infer malice from the want of probable cause.

If the action had been case, and not debt on the bond, no one would deny the legal accuracy of the charge. But the action is debt on a bond, the condition of which is, to pay all cost and damages that the plaintiff might sustain by wrong-

fully suing out the writ; and the question is, what will constitute a wrongful suing out of the writ in the legal sense of that term? I was strongly inclined, at first, to think the charge was correct, and that the the term wrongful, in a legal sense, was synonymous with malicious. But subsequent reflection and investigation have satisfied me that it is not. The writ may have been wrongfully sued out, although it was done without malice. In the case of Petit v. Mercer, 8 B. Monroe, 51, the suit was debt on a bond, the condition of which was, to pay all costs and damages for the wrongful procuring an order upon which an attachment was issued. The defence relied on was, that the defendant had good reason to believe that the ground on which the order was obtained was true; or, in other words, that he had probable cause. The Court of Appeals of Kentucky held, that the condition was broken, if the ground on which the order was obtained did not in fact exist, although the defendant honestly believed, at the time of procuring the order, that it did. They also held, that the bond was intended as a security for the actual damages the party might sustain, but did not cover the damages which the obligee might have recovered for issuing the attachment maliciously. This authority is directly in point, and, we think, it asserts the law correctly.

In the case before us, the bond, though not required by statute, was given in pursuance of an order of the Chancellor, and we must construe it in the same manner as if it had been expressly required by the statute.

The proper inquiry is, whether the condition is broken. To hold that it is not, unless the writ was obtained maliciously as well as wrongfully, would be to limit the meaning of the term wrongful, and, thereby, to change the condition; for an act may be wrongful, though not malicious. Indeed, it may have been done honestly, yet wrongfully; and if we were to withhold the damages which resulted from the wrongful issuing of the writ, because it was not issued maliciously, we should disregard the contract, or rather, add a term to it. It is the wrongful suing out the writ, that constitutes the breach of the condition, without regard to the question of malice; and the bond only covers such damages as the plaintiff in fact has sustained, and not such as might be allowed

on account of the malice with which the writ was issued. If the plaintiff would recover damages as for a malicious prosecution, he must sue in case; for, on the bond, he can only recover the actual damages, and they result from the act's being wrongful. Coxe v. Taylor, 10 B. Monroe, 17.

It is not to be inferred, that we intend to impugn the decisions of this court, in reference to attachment bonds, given in pursuance of our statute. Those bonds expressly stipulate for the payment of all such damages as the obligee may sustain "by the wrongful or vexatious suing out of the writ." The term "vexatious," we have held to mean "malicious;" and, therefore, we have held, that the obligors stipulate, as well against the malice with which the writ was issued, as against the act's being wrongful. Donnell v. Jones, 13 Ala. 490, and cases there cited. And had the bond in this case contained the same terms, we should give it the same construction; but as the term wrongful alone is used, malice is without the condition.

Neither is it to be understood from any thing we have said, that proof merely that the writ was wrongfully issued will, within itself, show a breach of the condition of this bond; for the condition is in the alternative, to prosecute the bill and writ to effect, or, failing therein, to pay all such costs and damages as the obligee might sustain from the wrongful suing of it out. Now, if the bill and writ had been prosecuted to effect, the condition would have been performed, and no action of course could be sustained upon it. But if the bill and writ were not prosecuted to effect, within the meaning of the bond, then the obligors are bound for all the actual damages which the plaintiff has sustained from the wrongful issuing of the writ, and he may recover them by showing that the writ was issued wrongfully.

We think it unnecessary to examine the questions growing out of the admission of evidence, to which the plaintiff objected; for, on another trial, the question of malice will be excluded, and the only legitimate evidence will be such as tends to prove or disprove the fact, whether the writ was wrongfully issued.

Let the judgment be reversed, and the cause remanded.

NOTE.—After the foregoing opinion had been delivered, the counsel for the defendants in error presented a petition, asking the court to consider another question, which, if decided in his favor, would show that the error in the charge of the court below, was error without injury. Mr. Cocke's argument upon this point is incorporated in his brief, which see.

DARGAN, C. J.—The rule, we admit, is established, that an error without injury will not reverse a judgment; but error raises the presumption of injury, and this presumption must be repelled beyond doubt, or we must remand the cause for another trial.

It may be also understood as a rule from which we will not depart, that we will not look to grave and doubtful questions, not raised by the assignment of errors, nor connected with the question in which the error is found, for the purpose of deciding that the error did not work injury. Such a practice would often take the plaintiff in error by surprise, and the judgment would be affirmed on questions not decided in the court below, nor argued in this court.

In the case of Armstrong v. Chastang, decided at the present term, the defendant in the court below insisted on an outstanding title to protect his possession. The court instructed the jury, that the defendant could not set it up, although such outstanding title might be perfect within itself. In this court, the defendant in error urged upon our consideration, that the outstanding title was not paramount to his, but in fact was inferior to it; but we said, that no decision was made in the court below upon the comparative merits of the two titles, and, therefore, we would not consider of them here.

So, in the case at bar, we find an error in the charge that malice was essential to the breach of the condition of the bond, and now, to avoid the consequences of this error, we are pressed to examine the writ of *ne exeat* itself, and to hold that it was void, and thus holding, to say that the error could not work injury.

We will not examine that question. It has not been decided in the court below, so far as we are informed by the

record; at all events, it is not in the slightest degree connected with the assignment of errors; and, to say the least, it is a question not free from difficulty, even if it could be decided in favor of the defendant in error. But as to this, we will intimate no opinion.

It would introduce a dangerous practice, to refuse to reverse an erroneous judgment, on the ground that the error was productive of no injury, if we were compelled, in order to determine that no injury had resulted from the error, to examine important and doubtful questions, not raised by the errors assigned, and probably not made or decided in the court below. When we refuse to reverse, because the error was productive of no injury, the ground on which we stand ought not to be open to controversy.

The application is refused.

POUNDS *vs.* RICHARDS ET AL.

1. Where two or more are jointly sued in trover, and there is a verdict of guilty against one defendant, and of not guilty as to the others, the court may set aside the judgment, and grant a new trial as to the defendant who was found guilty.
2. If the plaintiff has a just cause of action against the defendants, it cannot be defeated or released by any contract or agreement between the parties which is not supported by a valid legal consideration.
3. In estoppels *in pais*, it is an indispensable and essential requisite, that the representations or acts should have influenced the conduct of the person setting them up or alleging them.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

This was an action of TROVER, by the plaintiff in error against Daniel Rayfield, Elisha C. Wilson, Jacob Richards and George W. Johnson, for the conversion of two slaves, Isabella and Mary. The suit was discontinued as to Wilson, upon whom the writ was not served. There was a verdict of not guilty as to Richards and Johnson, and a verdict for

$447 against Rayfield. The judgment against Rayfield was afterwards set aside by the court, and a new trial was granted as to him alone; to which action of the court the plaintiff excepted, and now assigns it for error.

A bill of exceptions was sealed at the trial, at the instance of the plaintiff, which discloses the following state of facts: "The plaintiff introduced proof tending to show, that the two slaves mentioned in the declaration were in his possession prior to December, 1849, and were at that time his property; that in December, 1849, the defendant Rayfield sold said slaves at public outcry, in Syllacogga in Talladega county; that at said sale the defendant Richards bid off Isabella, at the sum of about $560, and paid $151 of that bid to Rayfield at the sale, and took the slave into his possession, and bound himself to pay Rayfield the balance of his bid a short time thereafter; that in a few days after this sale, Richards, who resided in Coosa county, sent one Pate to Rayfield at Syllacogga, to pay him the balance of the bid; that on arriving at Syllacogga, Pate met with the plaintiff, and told him that he was going to pay over the money to Rayfield; that the plaintiff made no objection, but remarked, that Richards had bid for the slave Isabella more than she was worth, and that he was satisfied with the sale, provided the money was applied to the debt for which she was sold; that in February, 1851, plaintiff met with Richards, and Richards told him he had sued him, whereupon plaintiff said, 'he had not directed him to be sued; that Wilson was the man he was after.' It further appeared that plaintiff was not present at said sale by Rayfield, but resided in Macon county at that time; that at said sale Rayfield also sold said Mary to Wilson for $400.

The foregoing was all the evidence adduced on the trial of this cause; and upon this evidence the court charged the jury: that, if they believed all the foregoing evidence, they must find the defendant Richards not guilty; to which charge the plaintiff excepted."

The charge of the court is also assigned for error.

RICE & MORGAN, for plaintiff in error.

L. E. PARSONS, *contra.*

CHILTON, J.—We do not assent to the proposition asserted by the counsel for the plaintiff in error, that the court could not grant a new trial, as to one party who was jointly sued, and refuse it as to another. In actions of tort, it is competent for the jury to find one of the parties guilty, and another not guilty. It may turn out also, that there may be no evidence conducing to show the guilt of one of the co-defendants, while, as to the others, there may be a strong case made out. In all such cases, should the jury find a verdict of not guilty as to all, and the court should think a new trial ought to be granted, it would be doing great injustice to the innocent party, as against whom there was no evidence, to order a new trial as to him. Indeed it would have been regular, if the plaintiff had introduced no proof whatever of the guilt of one of the defendants, to have directed his acquittal before the jury passed upon the guilt of the others, had any reason appeared for ordering such discharge, as that the other defendants desired to examine him as a witness. Harris v. Burns et al.

2. The Circuit Court erred, however, in the instruction given to the jury, in regard to the liability of Richards. We suppose this charge must have been predicated upon the idea, that what Pounds said to Pate, the agent of Richards, as to his being satisfied with the sale made by Rayfield, if the funds arising from the sale should be applied to the debt for which the property was sold, amounted to an estoppel *in pais*.

If such was the effect of Pounds' declaration, then the charge was right. But if this proposition is indefensible, the charge was clearly wrong; for if a just cause of action existed in favor of Pounds against Richards and Rayfield, by reason of the conversion of the slave in controversy, this cause of action could not be defeated or released by any contract or agreement between the parties which is not supported by a valid legal consideration. 7 Ala. 175.

This is not gainsayed by the counsel for the defendants in error.

Turning then to the question as to the estoppel: It is an indispensable and essential requisite in estoppels of this character, (*in pais*,) that the representation or act should have influenced the conduct of the individuals setting up or alleging them. Ryers v. Farwell, 9 Barb. Sup. Ct. Rep. 618.

Was Richards in any way influenced to pay the money which he bid for the property to Rayfield, by the representation or declaration of the plaintiff? He had paid a portion of the money anterior to the making of such statement, and he had bound himself to Rayfield to pay the remainder. He had sent the money by his agent Pate, with directions to make such payment, and it does not appear that the agent was invested with any discretion as to the payment dependent upon what Pounds might say or do; or that he was even directed to call on Pounds, much less to govern himself by what should be said by him. From ought that appears, the interview between Pate and Pounds was altogether casual. Pate, who was a competent witness, and who could have proved, had such been the fact, that he had instructions to govern his conduct in respect to the payment by what Pounds should say respecting the validity of the sale, and that the payment was influenced by such declaration, and would not have been otherwise made, was not examined; and this strengthens the presumption, which arises upon the absence of proof showing the contrary, that these declarations had no influence upon the conduct of Richards. As the charge cannot be rested upon this ground, it was erroneous; for it is clear, that the court could not, from the proof, assume that Rayfield had a right to sell.

Our conclusion, therefore, is, that the judgment must, consequently, be reversed as to Richards, and the cause must be remanded.

GRADY'S Adm'r. *vs.* HAMMOND.

1. When an issue is made up between the plaintiff in attachment and one claiming to be the transferree of the property or debt attached, the plaintiff is entitled to open and close the argument of the case, although the issue is so framed that the transferree is made to *affirm* the fairness and good faith of the alleged transfer.

Error to the Circuit Court of Chambers.

Tried before the Hon. E. Pickens.

Benj. L. Goodman, administrator of John Grady, deceased, sued out an attachment against the estate of Joel Hammond, and a writ of garnishment against Isaac Nolen, as the debtor of Hammond. Nolen appeared to the garnishment, and answered that he made a note for $140 to Hammond, but before the garnishment in this case was either issued or served, one Henderson Allen informed garnishee that he was the holder and owner of the note.

Goodman ceased to be administrator, and the plaintiff in error, Smith, was appointed administrator *de bonis non*, and became a party to the suit. The validity of the transfer of the note to Allen by Hammond having been disputed by the administrator of Grady, an issue was made up in the court below to test it. On the trial, the court caused the claimant of the note to take the initiative in the introduction of the proof, and allowed him to open and close the argument to the jury. The counsel for Smith claimed the right to open and close the argument to the jury, but the court refused to allow him to do so; to which refusal he excepted. The case presents no other question on the error assigned, than the refusal of the court to allow the plaintiff's attorney to open and close the argument before the jury.

S. F. RICE, for plaintiff in error.

No counsel for defendant.

LIGON, J.—According to the practice, as it has been for many years established in this State, the plaintiff is entitled to open and close the argument of his case before the jury. The only exception to his right to close the argument, is to be found in the 19th Rule regulating the practice in the Circuit Courts, which provides: "If the counsel for the plaintiff waives the right of opening the argument, he shall not have the right of concluding." Clay's Dig. 610, Rule 19; Worsham v. Goar, 4 Por. 441.

The attitude which the case assumed in the court below, does not change the rule in this respect. Through all the changes of parties in that court, the administrator of Grady is the actor, and, consequently, the plaintiff. His attachment commenced his suit, his garnishment brings in Nolen, and his

notice brings in Allen, the transferree of the note. Throughout, he occupies the position of plaintiff, and each of the other parties is brought in to defend against his pursuit; and the mere fact, that, in making up the issue with Allen, to try the validity of the transfer of the note to him, the latter was made to affirm the fairness and good faith of the transfer to himself, instead of denying fraud or unfairness imputed by the pleadings on the part of Smith, does not alter the relation of the parties to the case, or enlarge the rights of the defendant.

The counsel of Smith was entitled to open and conclude the argument on the issue, and as he did not waive his right, it was error in the court to refuse it to him.

Let the judgment be reversed, and the cause remanded.

DOE EX DEM. STEVENS *vs.* KING.

1. A plaintiff claiming under execution sale takes only the title which the defendant in the execution had; and although that may have been such a legal title as was subject to levy and sale, yet the defendant may defend by showing a superior legal title outstanding in another.
2. In ejectment, plaintiff claimed under a purchase at execution sale, and proved that the land was devised to the defendant in execution by his father, who had held possession under a bond for titles from one Y., and had paid the purchase money in full; defendant relied upon a contract for the purchase of the land from an Indian reservee, under the treaty of March 24, 1832, approved November 1, 1834, mesne conveyances from the grantees to said Y., and from him to one H. *Held:*

   That the outstanding legal title shown by defendant was superior to plaintiff's.

ERROR to the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

EJECTMENT by Stevens against King. It appears from the bill of exceptions, that the plaintiff relied on a deed from the sheriff, the land having been sold under execution against Thomas Jennings, Jr., on a judgment rendered in the Circuit

Court in 1832, and purchased by plaintiff. He also proved, that Thomas Jennings, Sr., went into the possession of the land in 1835, and continued in possession until his death in the spring of 1838, holding under a bond for titles from one Thomas Youngblood; that he had made payment in full of the purchase money to said Youngblood, and that he devised the land, by his last will and testament, to his son, said Thomas Jennings, Jr.; that said devisee resided on the land, and held possession under the devise for about a year, when he removed, and one Howard took possession. He further proved the value of the rents and profits of the land, and that defendant was in possession when the suit was brought.

The defendant then proved, and read to the jury, a contract for the purchase of the land by Caswell and Nuchols, from an Indian reservee, made in conformity with the provisions of the treaty of March 24, 1832, which said contract was approved by the President on November 1, 1834; also, a conveyance from said Nuchols of all his interest in the contract to Lanier and Kelly, as administrators of said Caswell; a deed from them, made under an order of the Orphans' Court, to said Youngblood, executed some time prior to December 14, 1844; and a deed from said Howard to defendant, for a portion of the premises, executed December 14, 1844.

Upon this evidence, the court charged, that the plaintiff was not entitled to recover; which charge is now assigned for error.

SEABORN WILLIAMS, for plaintiff in error:

Ejectment is to recover possession; the superior ultimate legal title is not therefore necessarily involved. 8 Ala. 264; 1 Blkfd. 133. The principle that plaintiff must recover on the strength of his own title, is in its meaning limited to this: that it must be good against the world, or against the defendant by estoppel. 6 Iredell, 159. By statute, power is given to dispose of land by last will and testament, whether it is held in fee simple, or less than fee simple. Clay's Dig. 596. One having an equity in land, may devise the same. Powell on Devises, 206; ib. 208; 15 Johnson, 343. Any interest that will descend to the heir is the subject of disposition by law.

Plaintiff claiming in ejectment, need not go further back than the will of one who died in possession. 4 Washington's C. C. Rep. 691; 1 Dallas, 68. Where estate is equitable, and disposed of by will, it gives a legal right of entry, and having once become an established legal right, it remains a legal right. 3 Dallas, 425.

The occupancy of young Jennings was legal; his title was legal; he was in possession with a paper title (the will) which was recorded, and the purchaser at sheriff's sale was not bound to go beyond that to examine into the title.

After the sale by the sheriff, young Jennings was the mere *quasi* tenant at will of Stevens, the purchaser, who could at any time have ejected Jennings. 1 Johnson, 44 and note 45. Had Stevens ejected Jennings, and taken possession, in what aspect would the title of King now stand? If Jennings were now sued instead of King, and was offering to set up the title of Youngblood or King, he must fail in his effort. 18 Johnson, 94; 2 Porter, 480.

One having no title sells land; afterwards he acquires title; it inures to his vendee's benefit, 13 Johnson, 316; and this is said to apply to sheriffs' sales. Prior possession will enable one to recover in ejectment. 7 Ala. 564; 9 Ala. 124. As to adverse possession, and the effect of deeds under such circumstances, see 2 Bailey, S. C. Rep. 321; 15 Ala. 363; 16 ib. 581; 13 ib. 222; ib. 41; 10 Ohio, 69; 7 Ala. 115; 10 ib. 249; 6 Hill, N. Y., 177; 19 Vermont, 156; 2 Pirtle's Digest, 519, 522, §§ 4, 31.

If the question of adverse possession does not arise, then Thomas Jennings the younger had such an interest in the land as was the subject of levy and sale under execution. If he had any legal title, it was subject, and Stevens, by his purchase, obtained this title. Although nothing but legal title is the subject of levy and sale under execution at law, it need not be a perfect legal title; any title or interest that is legal, is the subject of levy and sale under execution. Had young Jennings any legal title in the land, or was it purely equitable? Had he such an interest as he could maintain ejectment for? If he had, his title was to that extent legal; for, to maintain the action, a perfect legal title need not necessarily be shown.

J. E. BELSER, and CLOPTON & LIGON, *contra:*

The principle is well settled, that a defendant in ejectment may show an outstanding legal title in another, to defeat a recovery by the plaintiff, unless the defendant is estopped from some act done by him, or from some relation existing between him and the plaintiff, that will prevent him from insisting upon such outstanding title. 16 Johns. 197; 8 Watts, 519; 18 Ala. 475.

When this case was before this court at a previous term, the court decided upon the same state of facts, at least, with no material variations, that the evidence showed an outstanding title in another, superior to the title of the plaintiff. King v. Stevens, 18 Ala. 475.

A purchaser who has made full payment, and entered into possession of lands, but who has only a bond for title, has not such a title as can be sold under execution at law. 17 Ala. 270; 13 ib. 54; ib. 362; 15 ib. 414; ib. 619; 16 ib. 604; 17 ib. 412. Hence, Thomas Jennings, Sr., had no such title as could have been sold under execution at law. His title being only equitable, he could not vest in Thomas Jennings, Jr., by his will, any other title than that which he himself possessed. 1 Smith's Leading Cases, 519, 528; 3 Johns. Ch. 308.

GOLDTHWAITE, J.—The plaintiff in error, claiming under execution sale, takes only the title which the defendant in the execution had; and although his possession may have amounted to a legal title, so as to be the subject of levy and sale, yet it is obvious, that, if a superior legal title was outstanding in another, the defendant in error, who is a stranger to the execution, may defend under it. Thomas Jennings, Jr., the defendant in the execution, held under the will of his father, and the only title of the father was the bond of Youngblood. By the approved contract, the full legal title was vested in Caswell and Nuchols, Jones & Parsons v. Inge & Mardis, 5 Porter, 327; Roper v. Bradford, 9 ib. 354; and whether it remained in them, or passed to the heirs of Caswell, and Lanier and Kelly, or was transferred so as to vest in Youngblood or Howard, is immaterial, as, in either event, the outstanding legal title would be superior to

that under which the plaintiff claims, and thus prevent him from recovering. King v. Stephens, 18 Ala. 475.

It follows, that there is no error in the charge, and the judgment is affirmed.

GERALD, Adm'r. *vs.* MILLER'S DISTRIBUTEES.

1. Where a bill is filed by the distributees of an estate against the administrator, to set aside a transfer which he had fraudulently obtained from them of their interest, and to recover their distributive shares, his securities on his official bond may be joined as defendants.
2. Neither the administrator, nor his securities can complain in such case that no decree, except for costs, is rendered against the sureties.
3. An objection to the master's report, which is not on its face erroneous, cannot be raised for the first time in the Appellate Court, no exception having been taken to it in the court below, and no objection there made to its confirmation.

Error to the Chancery Court of Monroe.

Tried before the Hon. J. W. Lesesne.

This was a bill filed by Wm. Miller and the other complainants as the heirs at law and next of kin of Simon Miller, deceased.

The bill alleges, that Simon Miller died in the county of Monroe, in the year 1847, possessed of an estate of the value of $2,000, or upwards; that administration of his estate was first committed to one Bell; that the complainants are his heirs at law and next of kin; that sometime in the year 1847, after the death of the said Simon Miller, the defendant Gerald came to South Carolina where the complainants reside, and informed them of the death of said Simon, and by representing that he had left but little property, and was much in debt, induced them to sell to him their entire interest in the estate of their deceased uncle for $100, and procured from them a written transfer of their interest. This, they allege, was done falsely and fraudulently; that, after the return of Gerald to Alabama, the said Bell, who had been previously appointed administrator of Simon Miller, re-

signed, and the said Gerald procured himself to be appointed administrator *de bonis non* in his place. Nathan Gerald and the securities on his administration bond, John W. Foster and Wm. W. Hunt, are made defendants to the bill.

The bill prays, that the transfer to Gerald of the interest of complainants in their uncle's estate may be declared void for fraud, and that it may be directed to be given up to be cancelled; and that the said Gerald, as administrator of Simon Miller, may be required to settle said estate, and pay over to the complainants their respective distributive shares. The estate of Simon Miller consisted of personal property only.

The bill was answered by Gerald and Hunt, and a decree *pro confesso* was taken against Foster. The answer of Gerald denies that the complainants are heirs at law, or next of kin of Simon Miller; denies all fraud or imposition in procuring the transfer from complainants; admits that it was for the sum of $105; and offers, upon being paid back that sum with interest, to surrender up and cancel the transfer, and relinquish all interest under it.

He admits that he was appointed administrator *de bonis non* of Simon Miller, and alleges that he has made final settlement of said estate with the Orphans' Court of Monroe, and that upon such final settlement the assets found to be remaining in his hands were $\$2{,}130\frac{23}{100}$, for which sum alone he should be held to account. He demurs to the bill, for the misjoinder of Foster and Hunt, his securities, as defendants.

The answer of Hunt is a formal answer merely. He also demurs to the bill for want of equity, and because of improper parties.

The testimony shows, that the complainants were the cousins of Simon Miller, deceased: children of his mother's brother Sam'l. Miller. His mother was named Sally Miller, daughter of Wm. Miller, and had six brothers and sisters. They resided in MarionDistrict, S. C. All these brothers and sisters were dead, or had moved away, and had not been heard of for a great many years, (the old witnesses say forty and fifty.) None left children that were known, except Samuel Miller, and they were the complainants, six in number, all of age, and the minor children of one deceased sister. Sev-

eral old witnesses, in that part of South Carolina where Simon Miller was born and raised, and who knew him and his family well, testify, that they know of no relations of Simon Miller so near of kin as these cousins, the children of his uncle Samuel Miller.

The testimony of several of the witnesses goes to show, that fraud was practiced by Gerald in procuring the transfer; that these persons were very ignorant, and knew nothing except what he told them about the property of Simon Miller, and that he represented the estate to be in debt, and the property of small amount. The money paid by Gerald was paid back to him by complainants, agreeably to his offer in his answer.

The Chancellor, at the hearing, decided, 1. That the complainants were the next of kin of Simon Miller, deceased;

2. That the transfer from them to Gerald should be cancelled and held for nought;

3. That Gerald, as administrator *de bonis non*, should be held to make distribution of the assets in his hands among the complainants as the next of kin of Simon Miller; and for the purpose of ascertaining the amount of assets, the register is directed to take and state an account with the defendant Gerald, agreeably to the rules which prevail in the Courts of Probate.

Pursuant to this order, an account was taken by the register, by which he found against Gerald, as administrator *de bonis non*, a nett balance of $\$1,584\frac{55}{100}$, in his hands liable to distribution, besides two negro slaves, (men,) Webster and Anthony.

The report of the register was confirmed by the Chancellor, no exceptions being taken, and a decree rendered in favor of each of the distributees now living, and of Rufus C. Tony, the administrator of a deceased distributee, for the sum of $\$226\frac{36}{100}$, and execution in favor of each directed to issue against Nathan Gerald; and it was further decreed, that Gerald should expose to public sale the two slaves for cash, and make report of the sale and return of the proceeds to the next term of the court. And "it was further ordered, that each party should pay his own costs."

The errors assigned are:

1. That the court below erred in not sustaining demurrer for misjoinder of Foster and Hunt;

2. In not rendering decree against them, or dismissing the bill as to them;

3. In confirming report of the master;

4. In decreeing in favor of the complainants on the proof.

C. C. SELLERS, for plaintiffs in error.

R. C. TORREY, *contra.*

PHELAN, J.—Whenever it becomes necessary to proceed in equity against an administrator, for the recovery of a debt, legacy or distributive share, all the obligors in the administration bond may be made parties. Moore et al. v. Armstrong, 9 Por. 697.

It is quite clear, that these complainants had the right to go into a court of equity to have the transfer they made to Gerald set aside; and as they were suing for their distributive shares of the estate of their uncle, of which he was administrator, in the event they succeeded in having that set aside, it was proper to join his sureties on his administration bond, Foster and Hunt.

That no decree is rendered against them, except for costs, is a matter of which they cannot complain; nor can Gerald complain.

The decree upon the merits, is well warranted by the proof. See statement of the testimony.

No exception was made to the report of the master, nor any objection raised to the confirmation of that report in the court below, and, therefore, none will be heard for the first time in this court, the report not being erroneous on its face. Methodist E. Church v. Jaques, 3 John. C. 77; 2 Smith's C. Prac., 370; 9 Por. 80; 9 Ala. 180.

There is no error in the record, and the decree of the court below is affirmed.

ANDREWS' HEIRS AND ADM'RS. *vs.* BROWN'S ADM'R. ET AL.

1. When a partnership is dissolved by the death of one or more of the partners, the legal title to all the personal property and choses in action belonging to the firm becomes vested exclusively in the survivor, for the purpose of paying the debts of the firm, and distributing the residue, if any, among the parties entitled; but as to real property, the legal title to the share of the deceased partner descends to his heirs at law, and a court of law cannot regard or protect the mere equities of others.
2. In a court of equity, however, real estate belonging to the firm, purchased with the partnership funds and treated as partnership property, is considered as personal property; to this extent, at least, that it is liable to pay the debts of the firm, and the surviving partner has a claim upon it for that purpose, which is superior to the title of the widow and heirs at law of the deceased partner.
3. As the surviving partner is charged with the payment of the debts of the firm, he has the right in equity to dispose of its real estate for that purpose; and, although his deed will not convey the legal title to a purchaser, yet it will convey this equity to him, and through it he may compel the heir to convey the legal title.
4. Where land is purchased by a partnership at a sale made under a decree of foreclosure in chancery, and, after the death of one partner, the survivor files a bill to obtain the control of the real estate, for the purpose of paying the debts of the firm, and the land is redeemed pending the suit, the redemption money stands in the place of the land itself, and the surviving partner is entitled to it, for the purpose of paying the debts of the firm.

ERROR to the Chancery Court of Mobile.

Heard before the Hon. J. W. LESESNE.

The original bill in this case was filed by Thos. G. Brown, as surviving partner of the firm of E. L. Andrews & Co., of Mobile, against the heirs and administrators of the deceased partners, to obtain the control of certain stock and real estate standing in the name of E. L. Andrews or of E. L. & Z. Andrews, for the purpose of paying the debts of the firm.

The bill alleges, that said firm of E. L. Andrews & Co. was composed of E. L. Andrews, Zuligman Andrews and the complainant, and was formed on the 1st June, 1844; that said firm was dissolved in April, 1848, by the death of said E. L. and Z. Andrews, at which time it was wholly insolvent; that, at the time of the death of said E. L. Andrews, six shares of the capital stock of the Bank of Mobile stood on its books in his name,

and ten shares of the capital stock of the Alabama Life Insurance and Trust Company stood on its books in his name; "that said stock in both corporations was held by said E. L. Andrews, for and on account of said firm, and as its property, with no interest therein save as a partner under their articles of agreement;" that said E. L. Andrews also held, of the partnership property, and for the partnership account, and not individually, certain lands and tenements, viz: a lot in the city of Mobile on the south side of St. Francis street, another lot fronting north on St. Anthony street, and a tract of land in Sumter county, known as the "Gayle plantation;" that all of said lands stood on the books of said firm as partnership stock, and were held for the partnership account; that the lot on St. Francis street was paid for with the moneys of the firm; that the "Gayle plantation" was taken by them in settlement of demands due said firm; and that the lot on St. Anthony street was part of the original stock of said firm. The complainant also alleges, that he had agreed to assign the "Gayle plantation" to one Alexander C. Walker, in order to secure a debt of about $17,000 due him for money advanced by him to the firm.

Said A. C. Walker, the heirs at law of said E. L. Andrews and Z. Andrews, and their administrators, are made defendants to the bill. The articles of partnership are exhibited with the bill, which show, that the balance sheet of the books of the old firm existing between E. L. Andrews and Z. Andrews, was taken as the correct state of the liabilities and assets of the old firm, and the basis of the new firm; that the rents and profits of the real estate owned by the old firm should "belong to Z. & E. L. Andrews, they paying the taxes and expenses on said property; and should the said Z. &. E. L. Andrews sell the said real estate, and the proceeds not amount to the balance now standing against said account, say $22,442 $\frac{71}{100}$, then the said Z. & E. L. Andrews are to make good the amount to the new firm; but should the proceeds of the same, when sold, amount to more than $22,442 $\frac{71}{100}$, then the said excess is to belong to said Z. & E. L. Andrews."

The administrators of E. L. Andrews answer the bill, admitting most of its allegations; but they insist, that said real estate was owned by said E. L. Andrews & Co. before

complainant became a member of the firm, and that complainant had no interest whatever therein; they require full proof that said stock standing in the name of E. L. Andrews was partnership property, and deny all knowledge of the transactions between complainant and said Walker. They admit the insolvency of said firm at the time of its dissolution, and allege the insolvency of their intestate; also, that they are taking the proper steps before the Court of Probate to obtain a decree of insolvency, and that said real estate should be distributed according to law, among all the creditors.

Walker also answered, admitting the allegations of the bill, and setting up a conveyance to himself from the complainant of the said "Gayle plantation," to secure a large debt due to him from the firm; and he afterwards filed a cross-bill to obtain the benefit of his security.

The complainant afterwards filed a supplemental bill, alleging that the lot on St. Anthony street had been purchased by said E. L. Andrews, for said firm, at a sale made under a decree of the Court of Chancery, to foreclose a mortgage on said lot from one Basil Merlier to said firm; that, at the date of the foreclosure of said mortgage, one John S. Gliddon held an equity of redemption on the lot, and, since the death of said Andrews, he has redeemed the lot, by paying $2000 to Campbell & Chandler, the attorneys of the parties claiming under the decree of the foreclosure. The bill prays, that the money in the hands of said attorneys should be decreed to stand in the place of the land itself. Brown died pending the suit; but before his death he assigned to Campbell & Chandler the effects in their hands, for the payment of certain specified debts of the firm. Brown's adm'r. and Campbell & Chandler filed their bill of revivor and supplement, disclosing their interest; and other changes were made in the progress of the suit, which it is unnecessary to notice.

The case was submitted for final decree, on the bills, answers, exhibits and proof. The Chancellor rendered a decree in favor of the complainant, and also sustained Walker's cross bill; and his decree is now assigned for error.

P. PHILLIPS, for plaintiffs in error:

1. Is the property partnership property, and subject to the

control of the survivor? The articles of agreement show, that Brown was to have no interest in the real estate, as owner. The rents and profits were all to be received by Z. and E. L. Andrews, and the charges were to be paid by them. This is conclusive. It is not denied, that this property may be subjected by creditors; but, that Brown as a partner has a lien upon it, is denied. The only interest that he has, is, that the other partners should keep it up to the value at which it is estimated in the articles of partnership; and this was but a basis of credit, and gave Brown individually no ownership. If the firm had been wound up successfully, the real estate account would not have entered into the settlement. The partnership did not deal in real estate; nor was there any agreement that this should be used for partnership purposes. To constitute real estate personalty, it must be bought, not only with partnership funds, but for partnership purposes; in other words, there must be some agreement, express or implied, that the real estate shall be considered personalty. Heirs of Pugh v. Currie, 5 Ala. 448. If the estate was to be treated as partnership property, still Brown would have no right to exclude the representative of the deceased partner, who at least must be consulted as to any preference. Story on Partnership, 393, § 346–7; Bartlett & Waring v. McRae, 4 Ala. 690; Cox v. McBurney, 2 Sandford, 566; Rowley v. Adams, 29 Eng. Chan. R. 549; Lyttle v. Pope, 11 B. Monroe, 318; Buchan v. Sumner, 2 Barb. Chan. 199.

2. But if this property is to be considered partnership property, will a court of chancery lend its aid to secure the whole of the assets to a few creditors, when the debts of the firm amount to $200,000? Chancery will only administer its equity upon the ground of equality. 1 Story's Equity, § 63; Hammond v. Hammond, 2 Bland, 307; Egberts v. Wood, 3 Paige, 518; Ketchum v. Durkee, 1 Barb. 480; Hutchinson v. Smith, 7 Paige, 29. The complainants have no legal title, as it is well settled that one partner cannot convey the real estate of the partnership. Anderson v. Tompkins, 1 Brock. 464; Deloney v. Hutchinson, 2 Rand. 183; Piatt v. Oliver, 3 McLean, 29; Coll. on Partnership, § 133.

The demurrer to Walker's cross bill should have been sustained, because it contained no prayer that it might be heard

at the same time with the original bill; and also, because it was not founded on the matters in litigation in the original suit. 1 Edwards, 226; Hopkins' R. 58; 7 Ala. 217.

JOHN A. CAMPBELL, for defendant Brown; and P. Hamilton, for defendant Walker:

The case presents the right of the surviving partner to the control and disposition of the partnership assets. As to the personalty, there can be doubt, Story on Partnership, 470 to 492; and as to the realty, the following propositions are established beyond dispute: Where land is held by a partnership at the time of its formation, as a part of its capital stock; or, where it is afterwards purchased with the partnership funds, for partnership purposes, and is entered as stock on the books of the partnership; or, if it is not purchased with the funds of the partnership, but there is an an express contract or agreement between the partners, or a declaration by them, that it was intended to be treated as personal property—in all these cases, equity will consider the land as personal property, and the surviving partner will be entitled to it, for the purpose of paying the debts of the firm. His equity is superior to the widow's right to dower, and to the title of the heirs at law; and equity will hold the heir at law a trustee for his benefit. Coll. on Partnership, Perk. ed. § 129; 5 Metcalf's R. 576; Dale v. Hamilton, 5 Hare 382; 1 Swanst. 518; 1 Russ. & M. 45; 5 Metcalf's R. 562; 10 Leigh's R. 406; 2 Sandford's Ch. R. 366; Egberts v. Wood, 3 Paige, 518; Story on Partnership 127, *et seq.*; 5 Ala. 446; 19 ib. 596; 7 Vesey, 425; 9 ib. 400; 2 Barb. Ch. R. 165; ib. 336; 1 Hammond, 249; 3 Wheaton's R. 563; 1 Bro. C. C. 497; 2 Dess. Eq. R. 471.

In this case, the real estate was partly owned by the firm at the time of its formation, as a part of its capital stock, and the remainder was purchased with the partnership funds; it was entered on the books of the firm, as partnership property; it was treated by the partners as belonging to the firm; and was acknowledged to be such by Andrews himself.

It was entirely competent for Brown to make the conveyance of the "Gayle plantation" to Walker. The *bona fides* and validity of Walker's debt is fully established; as also, the

anxiety of E. L. Andrews that it should be secured. The surviving partner has the right to prefer one creditor to another. 3 Paige 518, *supra;* 2 Sandford's Ch. R. 366. The assignment by Brown to Campbell & Chandler, for the benefit of creditors, will be equally upheld, and enforced in equity. The money in the hands of the assignees, paid by Gliddon for the redemption of part of the land, if the firm had continued, would have passed into the firm accounts, and become assets of the firm; now, it must be decreed to stand in place of the land itself. 5 Metcalf, 576, and other authorities *supra.*

Walker might have filed an original bill; but his bill is also good, as a cross bill. 2 Sandford's Ch. R. 366; 5 Howard, 127; 2 Paige, 167; 7 Ala. 233; 15 ib. 512; 1 Dan. Chan. Pr. 370, note o; Story's Eq. Pl. 389; Mitford's Eq. Pl. 81; Hoff. Ch. Pr. 345. The cross bill was answered, and treated by the parties below as a cross bill, and was set down for hearing with the original bill; the Chancellor, therefore, properly considered it as such, and overruled the demurrer to it.

DARGAN, C. J.—When a partnership is dissolved by the death of one or more of the partners, the legal title to all the personal property and choses in action belonging to the firm becomes vested exclusively in the survivor: not, indeed, for his own peculiar benefit, but for the purpose of paying the debts, and then dividing the nett balance amongst those entitled, giving to the representatives of the deceased partner the same interest he would have taken, had he been in life, and the firm had been dissolved, not by death, but by mutual consent. But, as respects real property, the case is different at law; for the legal title descends to the heir at law of the deceased partner, and a court of law, looking to the legal title alone, cannot regard or protect the mere equities of others. In a court of equity, however, real estate belonging to the firm is considered as personal property, to this extent, at least, that it is liable to pay the debts of the firm, and then to distribution between the partners, in the same manner as if it had been personal instead of real estate. These charges upon the real estate, being prior to the claims of the representatives of the deceased partner, override his wife's title to

dower, as well as the title of his heir at law. The consequence is, that the heir at law holds the legal title subservient to, or in trust for, the surviving partner, who is charged with the payment of the debts. These principles of law, in my opinion, are so well settled, that they are no longer the subject of controversy. Story on Part. 127, *et seq.;* Coll. on Part. (Perkins' ed.) 183 to 145; 5 Ala. 446; Pierce v. Trigg, Leigh 406; Delmonico v. Guellaume et al. 2 Sand. Ch. 366; Dyer v. Clarke, 5 Mete. 562; 7 Vesey, 425; 5 Hare, 369.

Inasmuch as the real estate is considered as personal, for the purpose of paying the debts of the firm, and the surviving partner is charged with the duty of paying those debts, it must, of necessity, follow, that he has the right in equity to dispose of the real estate for this purpose; for it would never do to charge him with the duty of paying the debt, and at the same time to take from him the means of doing it. Therefore, although he cannot, by his deed, pass the legal title to the purchaser, which descended to the heir of the deceased partner, yet, as the heir holds the title in trust to pay the debts, and the survivor is charged with this duty, his deed will convey this equity to his purchaser, and through it, he may call on the heir for the legal title, and compel him to convey. See 2 Sand. Ch. 366: 5 Mete. *supra.*

Applying these principles to the facts exhibited by the pleadings and proof in the case before us, (but which we will not state in detail in this opinion,) we can perceive no error in the decree; for the proof, we think, is abundant to show that, although the legal title to the lands was held by E. L. Andrews alone, nevertheless, they belonged to the firm as partnership property, and were so treated by all the members of the firm. They never did belong exclusively to E. L. Andrews; consequently, the claims of the creditors of the firm are superior to his widow's right of dower, as well as to the legal title of his heirs at law. The lands were purchased with the funds of E. L. and Z. Andrews, who were then partners, and stood upon their books as partnership property, and when the new firm was formed, composed of E. L. and Z. Andrews and Thomas G. Brown, these lands were carried into the new firm as part of its capital, and were, therefore, partnership property.

As to the stocks purchased with the funds of the new firm, it is very clear, that they also are subject to the control and disposition of the surviving partner, Brown, notwithstanding they stand on the books of the Bank and the Insurance Company in the name of E. L. Andrews alone. In reference to the money received by Messrs. Campbell & Chandler, growing out of the redemption of one of the lots by Mr. Gliddon, we think it should stand in the place of the lot itself, and, consequently, subject to the disposition made by Brown of the lot.

We are satisfied there is no error in the decree, and it must be affirmed.

I will observe, in conclusion, that we do not intend, by any thing said in the foregoing opinion, to hold that a surviving partner is authorized to sell real estate for the simple purpose of making distribution amongst the partners themselves, and their representatives. That question is not raised in the case, and has not been considered; we only intend to decide this: the firm being insolvent, the surviving partner may dispose of the whole property to pay the debts, whether that property consists of real or personal estate.

The decree is affirmed.

GINGLES *vs* CALDWELL.

1. A bill of sale for a slave, a boy eight years of age, contained the following warranty: "I also do warrant Joe to be sound in mind and body, with the exception of his legs; and I do hereby bind myself, that, if his legs should injure him from being a serviceable boy at the age of fifteen years, to make him good." In an action for a breach of this warranty, *it was held:*
   1. That the meaning of the warranty was, that if the injury to the boy's legs should *lessen his capacity for service at the age of fifteen*, the vendor should make good that injury; and not, that the boy should have, at that age, a *market value*, equal to that of a boy capable of doing ordinary service on a plantation;
   2. That the measure of damages was, the difference between the boy's actual value at the age of fifteen, and what would have been his value if the injury to his legs had not lessened his capacity for performing the services usually rendered by slaves of that age;
   3. That evidence as to the boy's situation, both before and after the specified

time, to-wit: when he arrived at the age of fifteen, but not so remote as to furnish no reasonable presumption as to his condition at that time, was admissible;

4. That proof that plaintiff had allowed the witness to have the boy's services gratuitously during the year before the trial, was inadmissible as evidence.

ERROR to the Circuit Court of Lowndes.

Tried before the Hon. E. PICKENS.

STONE & COOK, for plaintiff in error.

WATTS, JUDGE & JACKSON, *contra.*

CHILTON, J.—This was an action by Caldwell against Gingles for breach of the warranty contained in the following bill of sale: "January 12th, 1842, received of Samuel P. Caldwell three hundred and forty dollars, for one negro boy named Joe, aged eight years; the right and title to said boy I do warrant, and will forever defend, to said Caldwell, his heirs and assigns. I also do warrant Joe to be sound in mind and body, with the exception of his legs, and I do hereby bind myself, that, if Joe's legs should injure him from being a serviceable boy at the age of fifteen years, to make him good to said Caldwell. Given under my hand, the date above—(signed)—C. H. Gingles:" the declaration averring that at the age of fifteen the slave Joe, by reason of said unsoundness in his legs, was of no value, &c.

It appears by a bill of exceptions, that the slave's legs had been burned before the sale, and the proof conduced to show that they gradually grew worse, from the time of the sale down to the trial of the cause; that, at the age of fifteen, his legs had become more crooked, and that one thigh and hip seemed to have dwindled away, and that he could not walk without extraordinary exertion. It was, however, proved on the other hand, that, although not "a full hand," he could render valuable service. Several witnesses deposed that they did not regard the boy, at the age of fifteen, as of any value, by reason of the fact that his limbs would eventually become so diseased as to render him a charge upon his owner.

On this testimony, the court charged the jury, that the intent and meaning of the warranty was, that the diseased con-

dition of the slave's legs at the age of fifteen, should not injure him as a serviceable boy; that the question to be decided by them was, whether the boy was serviceable at the age of fifteen. If, at that age, he was not serviceable, in consequence of the diseased condition of his legs, then the plaintiff was entitled to recover, and the measure of damage in that event was, the difference between the value of Joe as he was at fifteen, and the then market value of a boy of fifteen capable of doing ordinary plantation work; that the word "serviceable" in the bill of sale meant, that Joe should be as capable of doing ordinary plantation work at the age of fifteen, as if his legs had not been burned. The counsel for the defendant below insisted that this charge was erroneous, and prayed the court to instruct the jury, that the warranty did not require that Joe should be sound and healthy in his legs at the age of fifteen—also, that if Joe was capable and did perform valuable services at the age of fifteen, then there was no breach of the warranty as to the soundness of his legs, and that it was not necessary that the boy should be as capable of doing ordinary service as a sound, healthy boy.

The first question to be decided by us is, did the Circuit Court correctly construe the warranty contained in the bill of sale?

The slave was not sound at the time he was sold, by reason of the burn he had received, and if the warranty of soundness had been general, the vendor would have immediately been liable for its breach; but the vendor introduces an exception as to the slave's legs, and then proceeds to warrant specially as to the effect of the injury or unsoundness the boy then labored under, when he should arrive at the age of fifteen. Although not sound at the time of the sale, he might outgrow the injury, and this fact would, in all likelihood, be ascertained by the time he arrived at the age of fifteen. If, at that age, his legs should injure him from being a serviceable boy, that is, as we understand the parties meaning, if the injury should lessen his capability for service, Gingles agreed to make good that injury. This was a specific warranty, having reference alone to this injury at the particular age of fifteen. The warranty was not that Joe should possess at that age a market value equal to a boy capable of doing ordina-

ry service on a plantation. It has no reference to his market value, but to his capability for service merely. This may seem somewhat hypercritical; but when we consider that this boy, at the age designated, may have been capable of rendering ordinary service, and yet, by reason of being scarred and disfigured by the burn, or by the possibility of its subsequently injuring him, he might, and in all probability would have commanded a less sum in market than a boy who had never been injured, it is obvious the charge given becomes substantially erroneous and injurious to the warrantor.

The true measure of damage in this case is, the difference between the actual value of Joe, at the age of fifteen, and what would have been his value if the burn upon his legs had not lessened his capability for rendering the services ordinarily rendered by slaves of that age.

As respects the other points raised by the bill of exceptions, it is only necessary to say that, although the condition of the boy at the age of fifteen was the matter to be proved, till his situation both before and after that period, but not so remote as to furnish no reasonable presumption as tohis *status* at that time, may be given in evidence. It is obvious that no general rule can be laid down upon this subject, as much will depend upon the nature of the fact to be proved, as to the probability of its continuance to a given future period, or of its existence at a past period, whether proof of its existence either before or after the point of time when it must be shown to exist, was or was not too remote.

The proof that the plaintiff below allowed the slave to serve the witness a year next before the trial gratuitously, was not competent. It did not tend to establish that the services were worthless. Indeed, the proof shows the contrary; but admitting that the plaintiff may have esteemed them valueless, it was not permissible for him thus to make his own estimate evidence.

Let the judgment be reversed, and the cause remanded.

SHOMO *vs.* CALDWELL.

1. When the plaintiff in an action of detinue has color of title, and has had the peaceable possession of the chattel sued for, he can recover as against a mere wrong-doer who, by indirection or force, obtains and holds the present possession.

ERROR to the Circuit Court of Monroe.

Tried before the Hon. L. GIBBONS.

R. C. Caldwell brought an action of detinue against D. T. Shomo for the recovery of two slaves, named Edgar and Abram.

On the trial of the cause in the court below, the facts of the case were agreed on by the parties, and are these: On the 15th day of November, 1829, David Tate made a deed of gift to his sister, Rosanna Shomo, wife of Joseph Shomo, of certain slaves, including the two before named. This deed, by its terms, excludes the marital rights of the husband, and was duly recorded in the proper county. No trustee is named in the deed, but on the 7th of May, 1831, two trustees were appointed by the Circuit Court of Monroe county, on the application of Mrs. Shomo; but it does not appear that these persons ever accepted the trust, or in any manner took control of the slaves. In May, 1847, Joseph Shomo and his wife, having possession of the slaves, removed with them to the State of Florida. In 1849, Caldwell, having a full knowledge of all these facts, purchased the slaves, Edgar and Abram, from Joseph Shomo, and received from him a bill of sale for them, in which Rosanna Shomo joined. The consideration for the purchase passed to Joseph, and no portion of it inured to the benefit, or went to the use of Rosanna Shomo. The deed from Tate had also been recorded in Pensacola, Florida, where the slaves were; and Mrs. Shomo unwillingly united with her husband in making the bills of sale; both which facts were known to Caldwell before he accepted the bills of sale. Caldwell brought the slaves back to Alabama, when they ran away from him, and went into the possession of the plaintiff in error, of whom they were demanded by an agent

of Caldwell; but he refused to deliver them. It was also agreed that the boy Edgar was worth $800, and Abram $900; that the hire for each is $10 per month.

These are all the facts, and upon them the case was submitted to the judge in the court below, under an agreement, signed by the attorneys of each party, by which they consent that the court should render such judgment as in its opinion the law would pronounce upon the facts submitted.

The court rendered judgment for the plaintiff for the agreed value of the slaves, and damages for their detention.

JOHN A. CAMPBELL, for plaintiff in error.

R. C. TORREY, *contra.*

LIGON, J.—When the plaintiff in an action of detinue has color of title, and has had peaceable possession of the chattel sued for, he can recover as against a mere wrong-doer who, by indirection or force, obtains and holds the present possession.

Such is the case here; and without reference to the rights of Mrs. Shomo in equity, if she has any, we think Caldwell is placed, by his bill of sale, and his possession under it, in such a position with relation to the slaves in controversy, as to entitle him to recover of the defendant in the court below in this form of action.

There is no error in the record, and the judgment of the Circuit Court is consequently affirmed.

TANNIS *vs.* DOE EX DEM. ST. CYRE.

1. At common law, the right to inherit was dependent upon the duties which devolved on the natural-born subject, in return for the protection supposed to be afforded him by the sovereign, and sprang directly from the obligation of fealty, which, under the feudal system, was required of the vassal; and, although the reasons on which the rule was founded have in a great measure ceased, yet the rule still exists, and under its operation all persons entitled to take by inheritance at the common law possess the same right in this State, unless inhibited by our statutes, either expressly or by necessary implication.

2. Previous to the act of February, 1832, a free negro might inherit lands in this State; whether he can inherit where the descent was cast upon him after the passage of that act, and he was not a resident of this State on the first of February, 1832, *quaere?*
3. A slave who was emancipated prior to the passage of the act of 1834, (Clay's Digest, 545, §§ 37, 38,) may hold lands in this State.
4. A free negro, who was an inhabitant of Florida at the date of the treaty by which Spain ceded that territory to the United States, lost the character of an alien, by the operation of that treaty, and would be entitled to take lands by descent in the United States, if not incapacitated by the laws of the State in which the lands were situated.
5. A copy of a deed is not admissible in evidence, upon proof made to the court that the executor of the grantee had searched for the original, and had not been able to find it; that after the grantee's death, his son had carried off, to a place in the country where the grantee had been living, a small trunk containing his father's papers which the executor had not searched; and that the executor had made verbal application to him, both for the trunk and for the deed.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. L. GIBBONS.

EJECTMENT by Lucy St. Cyre against the plaintiff in error, to recover a certain lot, situated in the city of Mobile, which the plaintiff claimed as the sister and heir at law of one Cyrus Evans, a free man of color.

The plaintiff introduced evidence showing that the only child of said Cyrus was a slave, and that his brothers and sisters, with the exception of herself, were either dead or slaves; that the plaintiff was a slave at her birth, but was emancipated under the Spanish law about the year 1818, at which time she was a resident of Florida; and that she was found residing in Alabama, after the treaty of cession of 1819, by which the United States acquired Florida.

To let in secondary evidence of the contents of a deed from Joshua Kennedy to said Cyrus Evans, for the lot in controversy, the plaintiff proved to the court, by the executor of said Cyrus, that after the death of said Cyrus he had searched for the original deed, and had been unable to find it; that, soon after the death of said Cyrus, his son Alfred had carried off, to a place in the country where said Cyrus had been living, a small trunk containing his father's papers, which the executor had never searched; that the executor had made application to said Alfred, both for the trunk and for the

deed, and had not been able to obtain either. Upon this proof, the court admitted in evidence a registered copy of the deed; and the defendant excepted.

The court charged the jury, "that a negro could hold real estate in Alabama; and if they believed that Cyrus Evans was free, and the plaintiff also was free, she would inherit his property, if the jury should also find that the only child of said Cyrus was a slave, and his other brothers and sisters were either dead or slaves;" to which charge the defendant excepted.

The admission of the copy of the deed in evidence, and the charge given, are assigned for error.

JOHN A. CUTHBERT, for plaintiff in error.

W. BOYLES, *contra.*

GOLDTHWAITE, J.—The first question presented by the counsel for the plaintiff in error, is, as to the right of the defendant in error, as a free person of color, to inherit lands in this State. At the common law, the right to inherit was dependent upon the duties which devolved on the natural-born subject, in return for the protection supposed to be afforded him by the sovereign, and sprung directly from the obligation of *fidelitas*, or fealty, which, under the feudal system, was required from the vassal. 1 Black. Com. 366; 2 Kent's Com. 57. The reasons which operated in the establishment of the rule have, in a great measure, ceased; but the rule still exists, and under its operation all persons entitled to take by inheritance at the common law possess the same right in this State, unless inhibited by our statutes, either expressly or by necessary implication. It is not pretended, that there is any express inhibition under the laws of this State; but it is insisted, that the disability results from the legislative enactments which, from time to time, have been adopted in relation to this class of individuals, the spirit of which is said to be in hostility to the exercise and enjoyment of this right by them.

In the absence of any constitutional provision, regulating the course of legislation, it is a matter of difficulty, as well as of some delicacy, to determine upon questions of State policy.

Questions of this character should be determined by the State itself; and most certainly in all cases in which a court is called upon to declare that an important rule of property, recognized by the general law in force, is abrogated and repealed, as being contrary to the policy of the State; at least the indications of such policy, as furnished by the voice of the sovereign power, should be clear and certain. In other words, the right which is given by the general law, must be plainly and obviously inconsistent with the existing statutes; and if, upon a just interpretation of the latter, the two can exist together, the intention of the legislature that they should both exist, is to be presumed; and this court could not, with any propriety, in such a case, by the repeal of the rule, give effect to its own views of State interest, or State policy. Such a course would be legislative, rather than judicial interpretation.

No certain, or even definite conclusion, as to the policy of the State in relation to the toleration of free negroes within its limits, can be drawn from the constitutional provision in relation to the emancipation of slaves. The framers of that instrument unquestionably looked forward to the time, when the indiscriminate and uncontrolled exercise of the power of manumission by our own citizens, might bring with it evils of sufficient magnitude to require some restraint to be laid upon that power. But the provisions in relation to this object were prospective merely, and properly entrusted the entire subject of emancipation, within the State, to legislative discretion, to be exercised as the future interest or policy of the State might require. There is no constitutional provision, as to the right of free persons of color to come into the State; and it was not until February, 1832, that the accumulation of this class of population within our territorial limits, was regarded as an evil sufficient to demand legislative interposition. By the act of 1832, the immigration of free persons of color into the State was prohibited, under severe penalties; but its provisions applied only to individuals of that class who came into the State after the first of February of that year; and the discrimination thus made by the terms of the act is conclusive, to show that those who were not embraced by its provisions were not subject to its penalties, and, as a necessary

consequence, possessed all the rights which they possessed previous to its enactment. If the action of the legislature is to be regarded as a correct exposition of State policy, the expression of the legislature, defining the limits of such action, is equally conclusive, as to the extent to which that body intended the policy should be pursued; and having, in the present instance, virtually exempted from the operation of the laws directed against free persons of color, those who came into the State prior to 1832, no argument founded on the policy of the law can be maintained against those who are so situated. The charge of the court, therefore, that a negro could hold and inherit lands, was, as a general rule, correct; and if the plaintiff in error wished a more particular direction, to point it to a case where the descent was cast upon a free person of color who was not a resident of the State on the first day of February, 1832, he should have applied to the court for a special charge to meet that case.

It will be observed, that we do not decide the question as to the right of a free person of color to inherit lands in this State where the descent was cast since the passage of the act of 1832, and the heir was not a resident of this State on the first day of February of that year. That question does not necessarily arise upon the record; and the facts of the case, as presented by the bill of exceptions, render it improbable that it can arise upon any future trial of the case.

It is urged, however, that, if the policy of the law does not exclude the defendant in error, as a free negro, from the right to recover, yet, by the disability impliedly annexed to her condition as an emancipated slave, she is denied the right to hold lands in that capacity. We doubt whether this question properly arises upon the record, in the absence of any specific instruction on this point requested by the plaintiff in error; but, as the case must be reversed on another ground, and as the same question must necessarily arise upon another trial, it is perhaps proper that the point, so far as it is necessary to the determination of this case, should be decided; and upon this branch of the argument, it is sufficient to remark, that, previous to the act of 1834, (Clay's Digest, 545, §§ 37, 38.) there was no law which required the slave to leave the State, either after, or to complete, the act of emancipation. The act

of 1834 not only denied effect to the act of emancipation until the slave left the State, but secured the community against his return, by the infliction upon him, in that event, of servitude for life. If this act is considered as indicative of the policy of Alabama not to allow emancipated slaves to remain in the State, without reference to the State where their manumission was effected; still, there is no rule of construction, by which it could be applied to slaves who were emancipated before its passage, and the defendant in error would, therefore, be exempted from its operation.

We have considered the questions presented, involving the disability of the defendant in error, as depending upon the statutory provisions applicable to individuals of her *status* or condition, for the reason, that we know of no other principle on which to rest it. It is conceded, that there may be cases in which the right of the individual to hold and enjoy property may be denied, in the absence of any legislative provision; as in the case of slaves, where the right to make contracts, or to hold property, is in direct conflict with their condition, from which a civil disability necessarily results. But no such incapacity attaches to a free person of color, or to an emancipated slave; and it can only be fixed upon them by express legislative enactment, or by necessary implication.

The only remaining disability which is urged against the defendant in error, is, that of alienage. The evidence upon this point shows, that she was born in Florida, when that State belonged to a foreign power, and that she remained an inhabitant of that territory up to 1818. On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession, is as follows: "The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated into the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the rights, privileges and immunities of the citizens of the United States." This treaty is the law of the land; and, by its terms, the inhabitants of Florida were admitted to the privileges, rights and immunities of American citizens. But if the treaty contained no such clause, we entertain no doubt that, by its operation, the inhabitants of Florida at the time

of its execution would be enabled to hold lands in the United States. The effect of the treaty was not only to transfer the ceded territory, but the allegiance of its inhabitants, to the United States. There was a change of sovereignty, and the allegiance due from the inhabitants of Florida to the crown of Spain was, by the act of transfer, abandoned by that power, and transferred to the United States; and, as the right to inherit depends upon the state of allegiance at the time of descent cast, (Dawson v. Godfrey, 4 Cranch, 321,) it follows, that if the defendant in error was an inhabitant of Florida on the 2d of February, 1819, she lost the character of an alien, by the operation of the treaty of that date, and would be entitled to take lands in the United States by descent, if not incapacitated by the laws of the State in which the lands were situated. The evidence as stated in the bill of exceptions, shows, that the defendant in error was born in Florida before the treaty of cession, and of course the fact of alienage depended upon her being an inhabitant of that territory at the date of the treaty; but on an examination of the record it will be found, that the charge of the court was based entirely upon other portions of the testimony, with reference to which it was strictly correct.

The admission, however, of the registered copy of the deed from Joshua Kennedy to Cyrus Evans, we regard as erroneous. The evidence submitted to the court, as the preliminary for its admission, raised a strong presumption that the original deed was in the possession of the boy Alfred; and the only diligence shown to have been resorted to was, the verbal application to him by the executor of the grantee. There can be no fixed rules applicable to cases of this character; but the party relying upon the written evidence should at least be required to show, that he has, in good faith, and to a reasonable degree, exhausted those means which were in his power, and which would probably result in the production of the deed. If Alfred was a slave, application should have been made to his master or owner; and if he could not be found, or was unknown, that fact should have been shown to the court. If he was free, a subpœna *duces tecum* would probably have been effectual. But a mere verbal application to

the probable possessor, whether bond or free, we do not think was sufficient.

For this error, the judgment must be reversed, and the cause remanded.

SHIPMAN *vs.* BAXTER.

1. In trespass *quare clausum fregit*, for injury to the possession, if no actual possession is shown, the right of recovery depends upon the title, which draws to it constructive possession.
2. If the defendant relies upon the adverse possession of himself and those under whom he claims, he must show an actual possession of the *locus in quo*, or of some part of a legal sub-division of which it formed a portion.
3. In trespass *quare clausum fregit*, for cutting trees, where neither party is shown to have had actual possession of the land, it is erroneous to instruct the jury, that defendant would not be liable for the act complained of, if he did it "in the *bona fide* assertion of a claim of title, which he thought to be good;" his liability would depend on the strength of his title compared with that of the plaintiff's, and not on his own opinion of its strength.

APPEAL to the Circuit Court of Barbour.

Tried before the Hon. JOHN GILL SHORTER.

J. BUFORD, for plaintiff in error.

P. T. SAYRE, *contra:*

Plaintiff and defendant both deduce title from Jones. A title was outstanding adverse to Jones, at the time when he conveyed to Shipman, and adverse possession was held by his grantee, or those holding under him. Shipman had never taken possession under his deed; for Baxter was in peaceable possession, holding adversely to him. Baxter, therefore, could be guilty of no trespass while such possession continued. Shipman had never made any entry upon the land; and even if Baxter be considered a disseizor, no action of trespass could be maintained against him, while the disseizin lasted. While the disseizin lasted, the freehold was in Baxter, and he had a right to use the land as his own.

If a party out of possession could sue in trespass one holding adversely, any act of ownership by the latter would be a trespass, and the party out of possession could recover for every separate act; and then, in the action of trespass to try titles or ejectment, recover besides his *mesne* profits. Shipman's remedy was, to bring an action by which the titles would be tried.

The action is trespass *quare clausum fregit*, and Shipman could not sue unless he had possession of the land at the time of the alleged trespass. 1 Metcalf 534; 10 Pick. 164; 17 Mass. 302; 14 Mass. 94; 3 Johns. 468; 8 Mass. 415; 11 Mass. 526.

PHELAN, J.—Shipman sued Baxter in an action of trespass *quare clausum fregit* to recover damages for the cutting of some trees. The proof conduced to show that, at the time of the alleged trespass, the *locus in quo* was wild or uncleared land, "never in the actual possession of either party."

Shipman showed paper title in himself, by patent from the United States to one Jones, and by deed from Jones to himself in 1836.

The defendant also produced paper title from one Lewis D. McRae to D. McRae, in 1833, from D. McRae to John McRae, in 1844, and from John McRae to himself, in 1845. He also showed "a state of facts," in the language of the bill of exceptions, "from which the jury might or might not have inferred that said Lewis D. McRae was authorized by Jones to make the deed he did to D. McRae," through whom defendant claimed.

In view of this state of the case, the court charged the jury, "that if they believed the cutting of said trees was done by the defendant in the *bona fide* assertion of a claim of title which he thought to be good, that he was not liable in this action."

This charge of the court is assigned for error.

The case, under one aspect of the evidence, was shown to be in that posture when the rights of the parties in this action would have to depend on the relative strength of their paper title exclusively. If no one had actual possession of the land, *possessio pedis*, and this was a controverted matter of fact in

the case, the title draws to it constructive possession. Hence, in every case of trespass for injury to the possession, when no actual possession is shown, the right of recovery depends upon the title, and the contest becomes a contest as to superior title. Blackburn v. Baker, 7 Por. 284.

If it was intended to litigate the right of the plaintiff to purchase of Jones in 1836, on the ground that the land had been previously sold to those under whom the defendant claimed, and that he and those under whom he claimed were in adverse possession at the date of the sale from Jones to the plaintiff, the question should have been distinctly presented. To make such a point good, it would have been necessary to show that defendant and those under whom he claimed had been in actual possession of the *locus in quo*, or of some part of a legal sub-division of which it formed a portion; because such actual possession is essential to constitute adverse possession. 4 Kent 441; Dexter v. Nelson, 6 Ala. 69.

As between Shipman and Baxter, then, if neither was in actual possession, the constructive possession, and the concomitant right of action for injury to the possession, would reside with the party having the superior title.

It was consequently erroneous for the court to instruct the jury, that the defendant would not be liable for the act complained of, provided he did it "in the *bona fide* assertion of a claim of title which he thought to be good." The jury should have been instructed, that his liability depended, not upon his own convictions of the goodness of his title, but of its actual goodness according to the proof in the cause, as compared with that of the plaintiff; in other words, upon which of the two had the better title to the *locus in quo*.

For this error the judgment is reversed, and the cause remanded.

POWELL *vs.* GLENN ET AL.

1. If personal property be given, by words that would create an estate tail at common law, if the subject of the gift were land, the remainder over is void, and the first taker takes the whole.

2. Although the words "heirs of the body" ordinarily create an estate tail, yet they may be restricted and explained by other expressions; and if, from such expressions, the testator's intention appears to have been, that the estate of the first taker should cease with his life, and the property should then vest in his children, or, in default of children at the time of his death, then over to another, the remainder is good, and the words will be construed as words of purchase and not of limitation.
3. Where a testator, by one clause of his will, bequeathed certain slaves to each of his daughters, and to the heirs of her body begotten, and, by another clause, declared his intention to be as follows: "That the negroes willed and devised to my two daughters as above, are for their support and maintenance, and to the support and maintenance of the heirs of their bodies begotten, or to be begotten, and to descend directly after their death to the heirs of their bodies begotten. If either of my daughters above named should die without an heir of their body begotten, then, and in that case, the property so willed to them, or to the one that may so die without an heir, shall pass off, and become the property of my surviving daughter and my two sons, or their heirs; each one to have a share alike in the property so willed to the one so dying without heirs." *It was held:*
   That the words "*heirs of the body*," as used in this will, were synonymous with "*children*," and that the remainder over was good. (Re-affirming Graves v. Williams, 17 Ala. 62.)
4. When the legal title to slaves bequeathed is vested by the will in the executors, as trustees, the title of the trustees will not be continued beyond the time contemplated by the will for its determination.
5. Where a feme sole, one of several co-plaintiffs, marries, pending the suit, and her husband is not made a party, the objection, if it can avail in any case, must be taken by plea in abatement.
6. When one of several co-plaintiffs in an action of trover dies, pending the suit, and his personal representative is not made a party, the objection can only avail to reduce the amount of the recovery; and if no question is raised in the primary court touching the *quantum* of damages, the objection cannot be raised in the Appellate Court.

ERROR to the Circuit Court of Sumter.

Tried before the Hon. TURNER REAVIS.

This was an action of TROVER, brought by the defendants in error against the plaintiff, for the conversion of a slave, which the plaintiffs claimed under the will of their grandfather, Robert Graves. The clauses of the will bearing on the questions involved, will be found in the opinion of the court. The plaintiffs introduced the will, and then proved that they were the children of Sarah Glenn, one of the testator's daughters, who departed this life before the defendant acquired possession of said negro, and that the negro sued for was one of those bequeathed by the will.

The defendant then showed, that the negro was in the possession of said Sarah Glenn and her husband, under the will, up to the time of her death, which occurred before the defendant purchased; that after her death, the negro remained in the possession of her husband, and, while remaining in his possession, was levied on by virtue of an execution against him, and was sold, under said execution, to pay his debts; at which sale the defendant became the purchaser. The defendant further proved, that the testator's daughter, Mary Ann, mentioned in the fourth clause of said will, was alive, between sixty and seventy years of age, had never had a child, and was, in the opinion of a medical witness, past the age of child-bearing.

The court charged the jury, that, under the will of said testator, the plaintiffs, as the children of said Sarah Glenn, were entitled to recover; to which charge defendant excepted.

The record also shows, that, pending the suit, two of the plaintiffs died, and on motion it was ordered that the suit abate as to them; also, that Sarah G. Glenn, one of the plaintiffs, had married during the pendency of the suit, and on her marriage being suggested to the court, a *scire facias* was issued against her husband, which was returned executed; but no other steps were taken to make him a party to the suit.

The errors assigned are:

1. In rendering judgment against the plaintiff in error, without first requiring the legal representatives of those plaintiffs who had died pending the suit to be brought before the court, and without such parties;

2. In rendering judgment, without the husband of Sarah G. Glenn being a party in court;

3. In the charge given.

HUNTINGTON, for plaintiff in error, submitted a written argument, from which the following brief is condensed:

By the terms of the will, the heirs of the daughters are to take by inheritance; the negroes devised to the daughters are to "descend," directly after their death, to the heirs of their bodies begotten. The word "surviving," which has been held to have the force of determining, in certain cases,

that a definite failure of issue was intended, does not here apply to the whole class of executory devisees, but applies to the daughter only; by means of which, the limitation over to the daughter is contingent upon her survivorship, while as to the sons no such contingency is created. The limitation over to the daughter, dependent upon her survivorship, is to her alone; while the limitation to the sons is to them or their heirs. Neither of these peculiarities was noticed by this court, in Williams v. Graves, 17 Ala. 62. The distinction in point of fact between that case and this, may be thus stated: That was a suit by the testator's executor, against the administrator of Mary Ann's husband, to support the limitation over in favor of Sarah Glenn, should she survive her sister, and to the two sons; and the court held the limitation over good as an executory devise. In this case, Mary Ann still lives, childless and past the age of child-bearing; Sarah Glenn is dead, leaving issue; her husband, during her lifetime, was in possession of the negro, and after her death continued in possession, until it was levied on under an execution against him, and bought at the sale by the plaintiff in error. The action is now brought by the children of Sarah Glenn, to recover the negro from the execution purchaser. Some of the plaintiffs died, pending the suit, and their representatives were not made parties; and this is one of the errors assigned.

In Williams v. Graves, 17 Ala. 62, it is said, that "there can be no doubt that, by the fourth clause of the will, Mary Ann would have taken an estate tail at common law, had the subject matter of the will been realty." The language of the fourth and fifth clauses is the same; and, therefore, the same description is applicable to the estate which Sarah Glenn took under the fifth clause. But by our statute, an estate tail at common law is converted into an absolute estate in the first taker; and, hence, Sarah Glenn took at once an absolute estate. Her children, if they take at all, are to take by descent, for that is the language of the will. It is only in the event of her "dying without an heir of her body begotten," that the limitation over which this court has held to be good, is to take effect. But, as she died with an heir of her body begotten, the limitation over is defeated, and her estate re-

mains absolute; and, therefore, the marital rights of the husband attach, and the property becomes liable to his debts. Williams v. Graves, then, in this aspect of the case, does not touch the present case. The children here are asking the court to carry out and perfect an estate tail for their benefit, and thus overrule Ewing v. Standifer, 18 Ala. 400, where a bequest of negroes to one for life, to be divided among her lawfully begotten heirs at her death, was held to vest the absolute property in the first taker. The case of Burfoot v. Burfoots, 2 Leigh, 119, is very similar to this. There, the testator gives to each one of his grandsons an estate expressly in fee simple, upon condition that each should, at his death, leave issue of his body lawfully begotten, but in default thereof, over to the survivor; and the court held, that the grandsons took the estate in fee, but that the limitation over was valid as an executory devise. In that case, the fee simple estate was created by the terms of the will; in this, by operation of the statute. In both, the condition is the same; and in this, the limitation is defeated by the performance of the condition.

But the case of Williams v. Graves cannot stand, in connection with the doctrine, that where an estate is given to two or more, and, upon one's dying without issue, then his share to the survivor or survivors, the effect of the word "survivor" is to limit the failure of issue to the death of the first taker. In every case commented on by the court in that opinion, the word "survivor," or "surviving," was descriptive of the entire class of ulterior devisees; while in that case, as in this, it is only applied to the daughter, and not to the sons. See all the cases commented on in that opinion: 1 P. Williams, 534; 10 Johns. 11; 16 ib. 381; 6 S. & R. 46; 6 Munf. 455.

In Williams v. Graves, *supra*, the court also omitted to notice another peculiarity in this case, viz: that the limitation over is to the sons "or their heirs." Upon this point, the following authorities are cited, to show that the will contemplates an indefinite failure of issue: Postell v. Postell, 1 Bailey Eq.; Massey v. Hudson, 2 Merivale, 129; Stevens v. Patterson, 1 Bailey Eq. 42; Barlow v. Salter, 17 Vesey, 479.

If the court should be willing to re-examine the doctrine

in Williams v. Graves, as to the effect of the word "surviving," in limiting the failure of issue to the death of the first taker, the following additional authorities will be found applicable: Chadock v. Chadock, Cro. Jac. 695; Hope v. Taylor, 1 Burr. 268; Carter v. Tyler, 1 Call, 143; Sydnor v. Sydnor, 2 Munf. 269; Bells v. Gillespie, 5 Rand. 273.

R. H. SMITH and SAM. A. HALE, for defendants in error:

The construction of the will found in this record has been made in Williams v. Graves, 17 Ala., 62.; see also Flynn v. Davis, 18 Ala., 132. In this case Judges Chilton and Parsons, as well as the Chief Justice, hold the limitation not too remote. The two former hold the limitation void for repugnancy to the previous bequest, a question not involved in the case at bar. The written argument submitted for plaintiff treats the bequests to the daughters as estates tail, by considering the fourth and fifth clauses of the will without the sixth (qualifying and explaining) clause. The error is also committed of limiting the word "surviving" to the daughters, and the word "heirs" to the sons; by simply reading the clause, without improperly breaking the sentences, the error will appear.

It is attempted too to give the word "descend" a technical meaning, and thereby destroy the limitation to the daughters' children, making them take as heirs of their mother, and converting the mother's into an absolute estate. The language is, "shall descend directly" from the testator; if they took as heirs of their mother, they would take through her personal representative, and the property could not, on the mother's death, "descend" directly to them. This clearly shows the sense in which the word "descend" is used in the will to be, take as remaindermen. If there is any estate in the brothers and sisters, and if "descend directly" means take by will from testator, it follows the limitation to the heirs of the body must be good, or how could that resting on its failure be good?

The construction contended for does not militate against Ewing v. Standifer, 18 Ala., 400. In this case, it is held that "lawfully begotten heirs" means heirs generally; that they could not take both as heirs and purchasers, and that by

rule of law they shall take as heirs. The expressions in the will under consideration mean neither heirs, nor heirs of the body, but children and descendants of the children living at the death of Graves. The children of the daughters, by the description of "heirs of their bodies," are made participants in the legacy during their mothers' lives. How could this be, if the testator used the words in their technical sense? The trust is only to preserve the remainder, and is executed on the mother's death; then the property descended directly to the children of the deceased daughter. Comby et al. v. McMichael et al., 19 Ala., 747, 749–57. Again, the right in the executor to take possession does not prevent the plaintiff suing, Phillips v. McGrew, 13 Ala., 255; and the plaintiff in error acquired no right under his purchase, there being no leviable estate in the husband. Fellows, Wadsworth & Co. v. Tann, 9 Ala., 999. In England, by statute William, (Com. Dig. title Abatement H. 33, 3., 126,) of which our statute (Clay's Dig., 314 § 4) is a copy, the action survives, and should be carried on by the surviving plaintiffs only. McGowen and wife v. Young, 2. Stew., 376; Anderson et al. v. Knight, 2 Georgia Rep., 123; Sel. Practice, 191. The plaintiffs might have sued (the action being trover) jointly or separately, and in an action *ex delicto* a failure to join, even when necessary, could only be taken advantage of by plea in abatement. 1 Chitty's Pl., 11 Am. ed. from 6 London ed., 66–7.

A copy of the *scire facias* executed on the husband intermarrying with one of the plaintiffs pending the suit, is attached to the transcript, and which it is agreed by plaintiff's counsel shall be treated as part of the record. Independent, however, of this, it was the right of the husband to be made a party, and not doing so and not complaining, no one can object, were he not a party, especially on error. Morgan v. Painter, 6 Term Rep., 265.

DARGAN, C. J.—The material question in this case arises upon the construction of the will of Robert Graves, deceased. By the fourth clause, he gave to his daughter, Mary Ann, and to the heirs of her body begotten, two negro girls, a negro woman and child. The fifth clause is as follows: "I will and devise to my daughter, Sarah Glenn, and to the heirs of her

body begotten, a negro woman named Betty, of the age of twenty-six, and a negro boy named Sam, of the age of fifteen." The sixth clause is in the following language: "It is hereby declared more fully to be my intention, that the negroes willed and devised to my two daughters, as above, is for their support and maintenance, and to the support and maintenance of the heirs of their bodies begotten, or to be begotten; and to descend directly after their death to the heirs of their bodies begotten. If either of my daughters above named should die without an heir of their body begotten, then and in that case, the property so willed to them, or to the one that may so die without an heir, the property of the one so deceased shall pass off, and become the property of my surviving daughter and my two sons, or their heirs; each one to have a share alike in the property so willed to the one so dying without heirs."

It was shown that the plaintiffs are the children of Sarah Glenn named in the fifth clause of the will; that she departed this life before the suit was brought, and that the slave in controversy is one of those bequethed to her by the said will of her father. The defendant proved that the slave came into the possession of Sarah Glenn, and into the possession of her husband, before her death, and that he purchased said slave at sheriff's sale, as the property of the husband. Upon these facts the court charged the jury, that the plaintiffs were entitled to recover.

This will was before this court at a previous term, and the question then was in substance the same that it is now; that is, whether the remainder over created by the will was valid as an executory devise. We held, that it was. Graves v. Williams, 17 Ala. 62.

But this decision is assailed as incorrect upon principle, and as opposed to the subsequent case of Standifer v. Ewing, 18 Ala. 400. It is said to be wrong upon principle in this: that by the will Sarah Glenn would have taken an estate tail, had the subject matter of the bequest been land instead of personal property, and consequently she took the absolute property in the slaves. All the authorities agree, that if personal property be given by words that would create an estate tail at common law, if the subject of the gift were land, then the

remainder over is void, and the first taker will take the whole. This is the familiar rule, and is disputed by no one; and if the fourth and fifth clauses of the will of the testator stood alone, unexplained and unqualified by the sixth clause, that rule would apply. But we are not to interpret a will from one clause alone, but by every part of it that bears upon the matter, and from the whole we are to ascertain the testator's intention; and if from the whole will the estate be not an estate tail, but an estate for life with a remainder over, we must support the remainder, if it can be done consistently with the rules of law.

Let us, then, examine the sixth clause of the will; for that qualifies and explains the previous gifts. In that clause the testator declares it to be his intention, that the slaves given to his daughters should be for their support and maintenance, and for the support and maintenance of the heirs of their bodies begotten or to be begotten. Did he use the term "heirs of the body" in its technical legal sense, or did he intend to signify by the use of it, "children?" That the latter was his intention, there can be no rational doubt; for it is too manifest to admit of argument, that the testator supposed that the children of his daughters would derive a benefit under the will, or from the use of the slaves, even before the death of their mother. We will not undertake to decide that the children did take a vested interest before the death of their mother, for it is not necessary to do so; but, from the language employed, we feel assured that the testator thought that they would be benefitted by the slaves even during their mother's life; and if so, then it would be impossible for him to have used the words in their technical sense, for no one can be the heir of another, or the heir of his body, until the death of the ancestor; and if the testator used the words "heirs of the body" under the impression that such heirs of the body would or might be benefitted by the gift during the life of their mother, he then could have intended by the use of those words "children," and not "heirs of the body" in their legal acceptation only.

The words, "heirs of the body" ordinarily are words of limitation, and not words of purchase; but they are frequently used in wills to denote "children," or as synonymous with

"children," and when used in that sense by the testator, we must construe them as words of purchase, and not of limitation. Doyle v. Bouler, 7 Ala. 246; Fellows, Wadsworth & Co. v. Tann, 9 Ala. 999. And when, from other expressions in the will, we see that the estate of the first taker is restricted to a life estate, and the property devised by the terms of the will is to vest in the children of the first taker that may be then (at the death of the first taker) in life, we must then construe the words "heirs of the body" as words of purchase, and not of limitation. Darden's Adm'r v. Burns' Adm'r, 6 Ala. 362, and cases there cited. Any other rule of construction than this would violate the intention of the testator, or fail to carry that intention out when it would be lawful to do so. Indeed, all the authorities agree, that though the words "heirs of the body," or "dying without issue" do ordinarily create an estate tail, yet they may be restricted and explained by other expressions; and if, from such other expressions, we see that the testator intended that the estate of the first taker should cease with his life, and the property given should then vest in his children, or, in default of children at the time of his death, then over to another, in such cases we cannot refuse to give effect, to the remainder without violating the well settled rules of law. See Darden's Adm'r v. Burns' Adm'r, 6 Ala., and Graves v. Williams, 17 Ala., *supra*.

Nor does the case of Standifer v. Ewing, 18 Ala. 400, impugn in the slightest degree this well settled rule of law. In that case, the gift was to Lydia Standifer during her natural life, and at her death to be equally divided between her lawfully begotten heirs. There were no words restraining or explanatory of the words, "lawfully begotten heirs," and therefore the gift was the same as if it had been to Lydia for life, and at her death to her heirs; and such a gift as this, beyond doubt, gave to Lydia the absolute property. But the whole reasoning of the court in that case clearly shows, that if there had been explanatory words used in that will which showed that the testator intended the children of Lydia, and not her heirs in the technical and legal sense of that term, then the remainder over would have been good. But it is useless to pursue this subject further. We entertain no doubt but that

the words "heirs of the body," as used in this will, must be construed as words of purchase; that is, they signify "children," and are not to receive their usual technical meaning. The sixth clause of the will clearly denotes that the testator used them in that sense, and we must attach that meaning to them, or violate his intention. Giving that interpretation to the words "heirs of the body," the remainders over, beyond doubt, are valid, and the plaintiffs, upon the death of their mother, became entitled to the slaves.

But it is insisted that the plaintiffs could not recover, because, by the will of the testator, the legal title to the slaves was vested in the executors, who were authorized by the will to take possession of the slaves, and hold them for the benefit of the testator's daughters. But it is sufficient to say, that, by the terms of the will, the title of the executors, as trustees, was to cease upon the death of the daughter; for the property was then to pass off, and descend to her children, or, in default of children, over to others; and we cannot continue the title of a trustee beyond the time contemplated by the will when it should be determined. Comby v. McMichael, 19 Ala. 747.

Another ground relied on by the plaintiff in error, is, that one of the female plaintiffs married after the suit was commenced, and her husband has not been made a party. But it is enough to say, even if that objection could avail any thing in this case, that it could only be taken advantage of by plea in abatement. Chitty's Pl. 33; Morgan v. Painter, 6 Term, 265. It may be well doubted, however, whether the objection could have availed, even if it had been presented by plea in abatement.

The last objection to the regularity of the judgment, is, that one of the plaintiffs died after the suit was brought, and his representative was not made a party. This objection could only have been raised in the court below to reduce the amount of recovery; but no charge was given or requested, touching the *quantum* of damages to which the plaintiffs were entitled, and, therefore, it cannot be raised here. It may, however, be remarked, that it is by no means certain, but if two or more join in an action of trover, and one should die

before the trial, that the other plaintiffs are not entitled to recover the full value of the chattel converted.

We are satisfied that there is no error in the record, and the judgment must be affirmed.

RIGGS *vs.* PFISTER.

1. The appropriation act, approved February 10, 1852, by which the sum of two hundred dollars per annum is appropriated to the Quarter Master General, as his annual salary for the years 1852 and 1853, postpones for two years the operation of the general statute changing the compensation of that officer; and he is entitled during those years to the sum thus specifically appropriated. (Pamphlet Acts 1851-2, 83, 88, 529; and Military Code of 1851-2, 36.)

ERROR to the Circuit Court of Montgomery.
Tried before the Hon. JNO. GILL SHORTER.

Amand P. Pfister applied to the Circuit Court of Montgomery, for a *mandamus* against Joel Riggs, Comptroller of Public Accounts of the State of Alabama, commanding him to draw his warrant on the State Treasurer, in favor of said Pfister, for fifty dollars, the amount claimed by said Pfister as his quarter salary as Quarter Master General of the State, for the quarter ending April 20, 1852. Riggs appeared by his counsel, and resisted the motion; but the Circuit Court decided that Pfister was entitled to the amount claimed by him, and ordered the *mandamus* to issue. From this judgment Riggs sued out a writ of error, and now assigns it for error in this court.

M. A. BALDWIN, Attorney General for the State, and A. MARTIN, for plaintiff in error.
H. C SEMPLE, *contra*.

CHILTON, J.—This was a motion in the court below, by Pfister against Riggs, the Comptroller, for a *mandamus*, requiring the latter to issue his warrant on the treasury for fifty

dollars, alleged to be due to Pfister as his quarter salary as Quarter Master General, ending the 20th April, 1852. The Circuit Court granted the writ, and the Comptroller seeks a revision and reversal of the judgment, and insists by his counsel, that the law granting $200 as a salary to the Quarter Master General has been repealed, and different provision for his compensation provided by the legislature at its session of 1851–2.

It is somewhat remarkable, that the legislation upon this subject at the last session has left it in a most confused state, and such conflicting provisions were enacted as to render it impossible to reconcile them, in the attitude in which they are presented before the court by this bill of exceptions.

The Military Code, prepared by Generals Crabb and Bradford, provided a salary of two hundred dollars as the annual compensation to the Quarter Master General. Thus stood the law at the commencement of the last session, when several acts were passed, each separate and distinct from the others, but all approved on the 10th day of February, 1852. There is nothing from which we may gather any knowledge as to the actual order in which they were signed. One of these acts provides, that the compensation of the Quarter Master General shall be four dollars per day for every day he is actually employed in the duties of his office, which shall be paid upon an account stated, specifying the number of days employed, sworn to by him, and certified to be correct, which shall be paid out of any money in the treasury not otherwise appropriated: *Provided*, the compensation of the Quarter Master General shall not exceed one hundred and fifty dollars per annum; and by the fourth section of this act, so much of the Military Code above mentioned as allows $200 as a salary to the Quarter Master General, is expressly repealed. See Pamphlet Acts of 1851–2, pp. 82, 83.

An amended Military Code was also adopted at the last session by joint resolutions, (see Acts of 1851–2, p. 529,) and in this amended code it is provided, that the Quarter Master General shall enter into bond, &c., in the sum of $5000, with security, &c., and shall receive a salary of two hundred dollars. See Military Code of 1851–2, p. 36.

Again, the general appropriation bill, making provision for

the payment of the several officers, &c., for the years 1852 and 1853, provides, that the sum of two hundred dollars per annum be, and the same was thereby appropriated to be paid to the Quarter Master General. See Acts of 1851–2, p. 88.

It will be seen that there is a direct conflict between the provisions contained in the amended Military Code, and the act repealing the compensation allowed under the previous code, as to the salary to be paid the Quarter Master General. And it is manifest the legislature, by each of these, intended to adopt a general law, defining the compensation to be paid to that officer.

It is unnecessary now for us to decide upon the rights of the Quarter Master General, under these general statutes. It is sufficient, that we find a special statute voting an appropriation of two hundred dollars per annum for the years 1852 and 1853, and this statute postpones the operation of the general law fixing the compensation after the year 1853. The sum of two hundred dollars for each of these years has been specifically appropriated to be paid this officer, and it is not for the court to say that this specific appropriation shall be thwarted, because it may conflict with the provisions of a general law. It is more reasonable to infer that the legislature intended both the general and specific acts should stand—the special, as applicable to the two years to which, by its terms, it is limited; the general statute, as regulating the compensation after that period—than to suppose that they designed to produce a direct conflict by voting an appropriation to be paid to this officer, declaring by the general law that it should not be paid. It is the duty of the court so to construe statutes as to make them harmonize, if it can be done, and as the construction which we place upon the statute making the appropriation, agrees with one of the general acts, and allows the other to stand as a general statute, only postponing its operation until the specific sum awarded shall have been exhausted, we think it better accords with the legislative intention than any other we can adopt.

The court below, in ordering to be paid what the legislature has specifically appropriated, and required to be paid for the years 1852 and 1853, did not err. We repeat, that for these two years this specific appropriation takes the compen-

sation out of the influence of the general law which afterwards must regulate it, and to that extent must be considered as modifying the general statute.

Let the judgment be affirmed.

COPELAND *vs.* FLOWERS.

1. Assumpsit and trover cannot be joined in one declaration, and such misjoinder is bad on general demurrer.
2. Where the action is commenced before a justice of the peace, and removed by *certiorari* into the Circuit Court, where the plaintiff files his statement containing a count in assumpsit and a count in trover, a general demurrer will lie to it.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

Moses Copeland commenced a suit, by attachment, before a justice of the peace, against Mary Flowers, and recovered judgment for $50. The case was removed by *certiorari* to the Circuit Court, where the plaintiff filed the following statement: "Plaintiff states, by attorney, that heretofore, to-wit: on the 1st August, 1850, the defendant was indebted to him in a large sum of money, to-wit: the sum of $10 for services, work and labor rendered by him for defendant, at her special instance and request; also, for the further sum of forty dollars, being the value of a wagon belonging to plaintiff, and loaned and delivered by him to the defendant, to be returned to him when thereto requested; that plaintiff demanded the wagon to be returned to him, but the defendant wholly failed to deliver the same to him, whereby his wagon was wholly lost to him, to his damage $50."

The defendant demurred generally to the statement, and the court sustained the demurrer.

The judgment of the court below on the demurrer is here assigned for error.

SMOOT, for plaintiff in error.

PERCY WALKER, *contra.*

LIGON, J.—The statement filed in this case contains two counts. The first is *indebitatus assumpsit* for work and labor done; and the second appears to be a count in trover for the value of a wagon.

To this statement there was a general demurrer, which was sustained by the court below. The practice of demurring to statements in cases of appeal from justices of the peace, in which the case is required by the statute to be tried *de novo* on its merits in the Appellate Court, on an issue made up under its direction, was sanctioned by this court in the case of Williams v. Hinton, 1 A. R. 297, and has never been repudiated.

In the case under consideration, there is a clear misjoinder of causes of action; for it is too well settled to require a citation of authorities to prove it, that assumpsit and trover cannot be joined in the same declaration, and that such misjoinder is bad on general demurrer.

There is no error in the record, and the judgment of the Circuit Court must be affirmed.

ROSS, ADM'R. *vs.* PEARSON.

1. Where a creditor files, as a claim against an insolvent estate, an account for goods, wares and merchandize furnished to the intestate, and money paid for him, by the firm of which the creditor is the survivor; and the administrator, for the purpose of reducing the amount of the account, proves that the said firm collected money belonging to the intestate, upon the understanding that, when collected, it should be placed to his credit, the creditor may rebut this proof, by introducing evidence of another item of indebtedness from the intestate to the said firm, to which the money collected by them might have been applied, under the general authority given them by the intestate.
2. Although it is irregular to admit such rebutting proof before the administrator has offered the evidence which it is intended to rebut, yet its admission is not error, if the administrator admits that he will offer such evidence, and the record shows that it was subsequently introduced.
3. The individual debt of one partner cannot be set off against a partnership debt.

4. Although it is true, as a general proposition, that money voluntarily paid for another cannot be recovered from him, yet, if the payment is sanctioned and adopted by the debtor, he thereby makes the payor his agent, and the law then implies a promise to refund.
5. Where the evidence is such as to render the general rule of law inapplicable to the case, the court may properly refuse to give it in charge.
6. Where the charge given, if not critically correct, is fully as favorable to the plaintiff in error as if the court had charged the law correctly, the error furnishes no ground of reversal.
7. Where a surviving partner, on a settlement with the administrator of the deceased partner, accounts for a certain sum, as being due from a debtor to the firm, the settlement might, if unexplained, operate as an admission that such amount *only* was due from the debtor; but it would not estop the surviving partner, in a suit against the debtor, from recovering a larger amount. There can be no estoppel, where there is no privity.
8. The fact that the items of an account are not charged in the order of their dates, if it could operate at all, would not necessarily raise any legal presumption against the correctness of the account, but, at the most, would be a circumstance whose weight must be determined by the jury.

ERROR to the Court of Probate of Randolph.

This was an issue under the act of 1843, to try the validity of a claim filed by the defendant in error against the estate of Andrew Burnham, deceased, which had been regularly declared insolvent, and of which the plaintiff in error had been appointed administrator *de bonis non.*

The bill of exceptions shows, that the claim consisted of an account for goods, wares and merchandize sold, and money paid for said Burnham, by the firm of Pearson & Culbreath, of which the defendant in error was surviving partner. The account commenced in November, 1842, and was brought down to 1845, and the balance claimed, after deducting various credits, was $159 28. On the trial, Pearson offered evidence to show, that the said firm had sold and delivered to said Burnham a yoke of oxen, worth $40; which evidence was objected to by the administrator, on the ground that they were not charged as an item in the account; but the objection was overruled, and the evidence was allowed to go to the jury, for the purpose of rebutting certain evidence to be offered by the administrator; and to its admission the administrator excepted. Pearson also introduced evidence to show, that said firm had paid out sums of money to different persons for the intestate, which payments the intestate afterwards approved and confirmed.

The administrator offered evidence to show, that said Burnham had placed notes and accounts on several persons in the hands of said firm for collection, upon the understanding that the money as collected should be placed to his credit; that said firm was dissolved in the fall of 1845, and that said Culbreath died in March, 1846, and Burnham in July, 1848. He also proved, by the administrator of Culbreath, that he had a settlement with said Pearson, as surviving partner of said firm, and that, on such settlement, Pearson only accounted to him for $36 23, as the only debt due to the firm by said Burnham. He also proved, that other moneys amounting to $60 had been paid to said firm, on debts due to said Burnham; that, after Culbreath's death, Pearson closed up the unsettled business of the firm. He further offered to prove, that another sum of money was paid to said Pearson, as agent for said Burnham; but Pearson objected to such evidence, and his objection was sustained; to which the administrator excepted. The account filed contained items for articles sold in 1842, 1843 and 1844, and afterwards another item for articles sold in 1843.

Upon this evidence, the administrator requested the court to charge:

1. That, to authorize the defendant in error to recover for money paid out by said firm for said intestate, there must be proof of a previous request; which charge the court refused, and charged the jury: that, if the money was paid out, and the intestate, on being informed of it, did not object, but approved of the payment, then the law raised the presumption of a previous request;

2. That, if, after the death of Culbreath, Pearson, as the surviving partner of said firm, accounted with Culbreath's administrator for $36 23, as all that was due from said Burnham to said firm, up to the time of its dissolution by Culbreath; and if said firm had collected money on debts due to said Burnham, placed in their hands for collection, with the understanding that they were to be placed to his credit when collected, which they had not placed to his credit or otherwise accounted for; that the money so collected, and not placed to his credit, or otherwise accounted for, should be deducted by the jury from whatever sum was due to said

Pearson; and that, if such amount was larger than the amount admitted by him to be due on the account, they should find for the plaintiff in error; which charge the court refused, and the administrator excepted;

3. That the charging of an item for 1843 after items for 1844, was an irregularity, which raised a presumption against the fairness of the account, unless explained by proof. This charge also the court refused to give, and the administrator excepted.

The admission of the evidence objected to, the exclusion of that offered by the administrator, the refusal to charge as requested, and the charges given, are severally assigned for error.

HEFLIN, for plaintiff in error.

FALKNER, *contra*.

GOLDTHWAITE, J.—The claim of the defendant in error was founded upon an account for goods, wares and merchandize sold to the intestate of the plaintiff in error, and money paid for him; and the first question which is presented upon the record is, as to the admissibility of the evidence tending to show the indebtedness of the intestate for the yoke of oxen. This indebtedness did not constitute any item of the account filed, and could not, therefore, have been given in evidence to support the claim against the estate, and had it been received for that purpose, its admission would have been erroneous. But it is urged, that, although not admissible in that aspect, yet, as the evidence introduced by the plaintiff in error was for the purpose of reducing the account filed, by showing the collection of money by the firm of which the defendant in error was the survivor, upon debts due the intestate, and upon the agreement that it should be passed to his credit, that it was admissible for the purpose of showing a debt to which the funds thus collected were applied.

The bill of exceptions does not inform us, with positive certainty, that the evidence which it was offered to rebut, was brought to the view of the court; but, as all reasonable inferences must be made to sustain the judgment, we presume that it was admitted on the trial, by the plaintiff in error, that

such evidence would be offered; and in that point of view, its admission, though irregular, would not be error, if the record shows that testimony was subsequently introduced which would have rendered it admissible. The record does show affirmatively, that debts due to the plaintiff in error were collected by the firm of which the defendant in error was the survivor, belonging to the intestate, and upon the understanding that the amounts should be passed to his credit; and we regard the authority given to the firm, to credit the intestate with the sums thus collected, as sufficient to authorize the application of the money to the payment of any claim which such firm held against him. And, while the evidence objected to could not have been admitted to offset the indebtedness attempted to be raised, by the testimony in relation to the collection of the money; yet it was admissible for the purpose of showing a demand to which the collecting agents had the right to appropriate the funds collected. It may be remarked also, that the account against the estate was, so far as we are able to judge from the bill of exceptions, a store account, and the purchase of the oxen might well be considered as a transaction outside of the mercantile business, and for that reason not included in the account.

In relation to the evidence tending to show that an amount due to the intestate of the plaintiff in error had been paid to the defendant in error, as his agent, there was no error in refusing to admit it. It was an attempt to set off the individual debt of one partner against a partnership debt, which is in direct opposition to the principle asserted in the case of Taylor v. Bass, 5 Ala., 110. See also Von Pheel v. Connally, 9 Porter, 452.

Neither was the refusal to charge "that, to authorize the plaintiff below to recover for money paid, a previous request was necessary," under the circumstances, erroneous. Evidence had been offered, tending to show that the payments made by the defendant in error had been sanctioned and approved by the intestate; and, although it is true, as a general proposition, that money paid voluntarily cannot be recovered back, yet, if the payment is sanctioned and adopted by the debtor, he, by that act, makes the payor his agent, and the law then implies a promise to refund. Roundtree v. Holloway, 13

Ala., 357; Kenan v. Holloway, 16 Ala., 53. The legal proposition asserted by the charge asked was correct, as a general rule; but, as the evidence tended to show an approval of the payment by the real debtor, the giving of a charge which merely stated the general rule would probably have misled the jury, and therefore would have been improper. We think the true doctrine is, that where the evidence is such as to render the general rule inapplicable, the court may properly refuse to give it in charge. The charge given in connection with the evidence referred to, "that, if money was paid out, and the intestate, on being informed of it, approved of the payment, then the law raised a presumption of a previous request," if not critically correct, was fully as favorable to the plaintiff in error, as if the court had charged, that the adoption by the debtor of a payment made without request would have the effect to charge him; and this being the case, the error furnishes no ground for reversal. Randolph v. Carleton, 8 Ala., 606.

The concluding portion of the second charge which was requested, was in substance, that, if the defendant in error, as the surviving partner of Pearson & Culbreath, accounted only for the sum of $36 23, to the administrator of his deceased partner, as all that was due from the intestate to the firm, and that there had been collected, of the debts due to the intestate, an amount sufficient to pay the sum thus accounted for, upon the agreement that it should be placed as received by the firm to the credit of the intestate, in that event they should find in favor of the plaintiff in error. The legal proposition asserted by this part of the charge is, that the accounting with the administrator of a deceased partner for a certain sum, as due from a debtor to the firm, would estop the surviving partner from the recovery of a larger amount from the debtor. The accounting for a certain sum with the representative of the deceased partner, might be evidence which, if unexplained, would operate as an admission that such amount only was due; but if the settlement had been made with the debtor himself, it would not have precluded the recovery of items which were not included in the settlement, and which were shown by the evidence to be due; and if it could not have that effect when made with the

debtor, *a fortiori*, it could not when made with a third person. There can be no estoppel, where there is no privity. Miles v. Miles, 8 W. & S., 135.

Neither was there any error in the refusal of the last charge requested. If there was a want of proof as to any particular item of the account, such item could not be recovered, and if the law allowed the books to be introduced as evidence, any irregularity in keeping them might very properly have been taken into consideration by the jury; but, as, under the issue in this case, the whole account was necessarily required to be established by proof, we do not see how the connection in which the various items of which it is made up were stated, can be taken as any evidence against its correctness. If, however, the fact which forms the basis of this charge could operate at all, we do not think it would necessarily raise any legal presumption against the correctness of the account, but, at the most, it would be a circumstance the weight of which it would be proper for the jury to determine. Had the charge been given in the terms in which it was asked, it would have been equivalent to instructions, that the account must be regarded as unfair unless the circumstance referred to was explained by proof. There was no error in its refusal.

The judgment must be affirmed.

GOSS ET AL. *vs.* DAVIS.

1. After a cause which was taken to the Circuit Court by appeal from a justice of the peace, has been once continued, it is too late for a party to object that he had no notice of the appeal: especially, when the judgment entry recites that "the parties were present at the previous term."
2. A motion to dismiss the appeal, for the want of a sufficient appeal bond, should be made at the first term of the court to which the appeal is taken.
3. Although a judgment against one of the joint makers of a note, who are all sued jointly and served with process, is a discontinuance of the action; yet, where the proceedings are instituted before a justice of the peace, and a final judgment is rendered in the case, which is taken by appeal to the Circuit Court, the cause must be there tried *de novo*, without regard to any defect in the proceedings had before the justice.

ERROR to the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

CLOPTON & LIGON, for plaintiffs in error:

This was a joint action against several defendants. It was erroneous for the justice to render two distinct judgments; one in favor of Davis against John J. and Mary E. Magee on the 25th May, 1850, and the other in favor of Sarah Goss against David Davis, on the 10th August, 1850. True v. Clark, 3 Bibb, 295; Edwards v. Lewis, 18 Ala. 494; Prewitt v. Caruthers, 7 How. Miss. 304; 6 Black. 485.

This error was not cured by an appeal to the Circuit Court; for, although the proceedings in the Circuit Court are *de novo*, yet the appeal in this cause was taken from the judgment in favor of Sarah Goss against Davis. The statute requiring that appeals from a magistrate's court shall be tried according to their equity, does not embrace cases where the inferior officers entirely disregard the general course of law. Hemphill et al. v. Coats, 4 S. & Por. 128.

The court had no power to render judgment against John J. and Mary E. Magee, they having had no notice of the appeal. Wiggins v. Perryman, 4 S. & Por. 94.

RICE & MORGAN, *contra.*

PHELAN, J.—David Davis sued Sarah Goss, John J. Magee and his wife Mary E. Magee, formerly Mary E. Goss, before a justice of the peace, as joint makers of a promissory note. Magee and wife made no defence, and judgment was rendered against them by the justice on the 25th May, 1850, for the amount of the note and interest, and in favor of the other defendant Sarah Goss, who had pleaded *non est factum*, against Davis for costs. Davis, under the statute, took an appeal to a jury. On the 11th August, the case between David Davis and Sarah Goss was submitted to a jury, who returned a verdict in favor of Sarah Goss, and judgment was rendered against him accordingly for the costs by the justice. From this judgment Davis took an appeal to the Circuit Court, and gave bond, which was made payable to Sarah Goss only.

The cause was tried *de novo* in the Circuit Court, and the following is the judgment entry at Spring term, 1851:

David Davis, v. Sarah Goss, John J. Magee and his wife Mary E. Magee. } This case, and another between the same parties, were brought to this court at the last term, by appeal from a justice's court, and were, at the last term, consolidated by consent; and at this term proper and sufficient pleadings, including a declaration containing counts on two promissory notes amounting to seventy-eight $\frac{55}{100}$ dollars, and common counts, were considered as filed as between the plaintiff and all the defendants, no one of the defendants contesting except Sarah Goss, and John J. Magee and his wife Mary E. Magee failing to file any plea; thereupon came a jury," &c. The verdict was for the plaintiff, and judgment was rendered against all the defendants, naming them.

It appears from the bill of exceptions, that a motion was made at the trial term to dismiss the appeal as to John J. Magee and Mary E. his wife, on the ground that no notice had been given to them of the appeal, and that no appeal bond had been executed to them. The motion was overruled.

The court was requested to charge the jury, that the judgment against said John J. Magee and Mary E. his wife, in May, 1850, operated as a discontinuance of the suit as to Sarah Goss, and that plaintiff could not recover in this action; which charge the court refused.

These two matters are assigned for error. There is another assignment of error, relating to the competency of Mary E. Magee as a witness for Sarah Goss, but this has not been noticed in the brief, and is therefore considered as abandoned.

It is too late, after a cause has been once continued, for a party to object that he has not had notice of an appeal. Hancock v. Holmes, 3 Ala. 9. It would also appear from the judgment entry, that the "parties" at the previous term were present, and consented to a consolidation of the two causes.

The motion to dismiss the appeal for the want of a sufficient appeal bond, came too late. It should have been made at the previous term. Payne v. Martin, 1 Stew. 61; ib. 407.

The charge requested by the defendants was properly refused. Although it be true, that a judgment against one of

the joint makers of a note, who are sued jointly, and upon whom process has been executed, is a discontinuance of the action, and the course pursued by the justice of the peace may be liable to that objection, it cannot be pretended there is not a final judgment in the case. Whenever that is the case, an appeal will lie, and when brought into the Circuit Court the cause must be tried *de novo*, without regard to any defect in the proceedings before the justice. Hart v. Turk, 15 Ala. 775, and authorities there cited. The only strict rule to which such proceedings are subjected is that there must be no change of parties. 8 Ala. 491; ib. 810.

Let the judgment be affirmed.

O'NEAL *vs.* BROWN.

1. Where a tort is committed by the taking at one time of several chattels, the property of one person and in his possession at the time, it gives him but one cause of action, and he cannot be allowed to split it up and bring separate suits for separate articles, although he was possessed of some as trustee, and of others in his own right.
2. And if the plaintiff in such case, first declaring as trustee, recovers in trespass for the taking of the goods which belonged to him as trustee, and brings another action for the goods which belonged to him individually, the record of the former judgment sustains the plea of a former recovery, and bars a second recovery.

ERROR to the Circuit Court of Tuskaloosa.

Tried before the Hon. THOMAS A. WALKER.

E. W. PECK, for plaintiff in error:

The trespass complained of in both actions being one single act, the first recovery is a bar to the second action; and the mere fact that the plaintiff claimed a part of the goods as trustee, cannot vary the case. Oliver v. Holt, 11 Ala. 574; Bendernagle v. Cocks, 19 Wend. 207; White et al. v. Oliver, Moseley et al., 8 Pick. 356; Hite v. Long, 6 Rand. 457; Furrington & Smith v. Payne, 15 Johns. 431.

On the question of mingled goods, I refer the court to the

cases of Shumway v. Rutter, 8 Pick. 443, and Bond v. Ward, 7 Mass. 123.

The defendant here is not bound to show, that plaintiff might have recovered in the first action for the goods which belonged to him individually. If he had brought that action in his own name, he might have recovered for the whole injury; that he did not so bring his action, is his misfortune, not our fault. 15 Johns. 431; 6 Rand. 457.

P. & J. L. MARTIN, and WATTS, JUDGE & JACKSON, *contra:*

1. The judgment of the court upon the replication of *nul tiel* record, was certainly correct. The record introduced in evidence was different as to parties and subject matter from those alleged in the plea. It is true, Brown sues in both cases; but in one as trustee for certain creditors, and for different property, although of similar character; in the other, he sues in his own right, and for property which he claims as his own.

2. The charge asked was properly refused: 1. Because the trespasses, although done at the same time, were different, and the damage done to different persons and to different property. In one the goods belonged to the plaintiff in this suit, suing in his individual right; and in the other to the plaintiff in this, suing as trustee for creditors of &c. As well might it be said, that if the sheriff had levied on goods belonging to a half dozen different persons at the same time, a recovery by one would bar any recovery by either of the others. 2. But the charge should not have been given, because it asked the court to charge, that a matter which occurred subsequent to the commencement of the suit, could defeat a right of action which was once perfect. If the judgment could have any effect whatever, it could only mitigate damages; it could not defeat a recovery entirely. The plaintiff would certainly be entitled to recover his costs up to the time of recovery of the first judgment and plea in this case. A plea in abatement, if the suits had been for the same thing and by the same persons, might and would have defeated the recovery. But there was no plea in abatement, but a plea which can only be regarded in bar as *puis darrein* continuance.

DARGAN, C. J.—This was an action of TRESPASS commenced by Brown against Lyon and O'Neal, for the taking of certain goods, wares and merchandize, the property of the plaintiff. Lyon died, and the suit abated as to him. The defendant O'Neal pleaded not guilty, justification, and a former recovery for the same trespass. To the plea of former recovery, the plaintiff replied *nul tiel* record. This issue was tried by the court, and was decided against the defendant, who excepted to the judgment of the court, and now assigns it for error. In support of the plea of former recovery, the defendant introduced the record of a suit, commenced on the same day that the writ in the case before us was issued, against Lyon and O'Neal, for the taking of certain goods, wares and merchandize. The death of Lyon was suggested in that suit, and a recovery was had against the defendant O'Neal. In that case, however, the plaintiff Brown described himself as trustee in the writ, and in the declaration he describes himself thus: "John T. Brown, as trustee for the benefit of certain creditors of Theron Brown, specified and named in a certain deed of trust executed and delivered by the said Theron Brown to the said John T. Brown, on the tenth day of May, 1845, which was duly recorded," &c. To the declarations in both actions a schedule of the goods was attached, and the articles in each appear to be different. These are the material facts, upon which we must determine whether the court erred in deciding the issue of *nul tiel* record in favor of the plaintiff.

It must be borne in mind, that the plea does not deny that the two suits were founded on the same act of trespass. It simply puts in issue a former recovery for the trespass. We, therefore, have this question presented: the plaintiff being in possession of a stock of goods, a part of which belonged to him in his own right, and the other part or portion belonged to him as trustee for the benefit of others, which are all seized by one act of trespass, can he be permitted to sue as trustee for the goods belonging to him in that character, and after a recovery sustain another suit for the goods that belonged to him in his own right?

The trespass was one act, and it gave one cause of action, in which full damages could have been recovered; and I see no

reason why the plaintiff should be allowed to split up the cause of action, and to bring two suits and obtain two recoveries. The rule of law is indisputable, that one cause of action cannot be split up or divided into several. Oliver v. Holt, 11 Ala. 574; 8 Pick. 356; 15 Johns. 432; 19 Wend. 207. And therefore it is, that, if the plaintiff fails, or omits to prove his entire claim, and recovers for a part only, such recovery is a bar to an action for the remainder. Oliver v. Holt, *supra*, and cases there cited.

But it has been contended, that this rule will not apply, if the entire claim could not be recovered in the first suit; and that, as the plaintiff, in the suit that was tried, declared only for the damages done to the goods which belonged to him as trustee, he could not have recovered damages for the goods which belonged to him in his own right. It may be, that the form of the declaration in the first action would have confined the recovery to the value of the goods which belonged to the plaintiff as trustee; but even if that be so, I cannot see that the plaintiff may bring another suit on the same cause of action, merely because his declaration in the first was not broad enough to recover damages commensurate with the injury, or because it sought a recovery for part of the damages only. In the case of Hite v. Long, 6 Rand. 457, the injury consisted in stopping the plaintiff's wagon and team, and taking a horse from the wagon; he brought trover for the horse and recovered his value, and then brought trespass to recover damages for stopping his wagon. The Court of Appeals of Virginia held, that the recovery in trover was a bar to the action of trespass, because the plaintiff might have recovered in trespass da nages for the entire injury, and as he elected to bring trover for the value of the horse, he could not maintain trespass for stopping his wagon.

This authority I think directly in point: the stopping of the wagon and taking the horse was one act, and gave one cause of action; and the plaintiff having elected to bring trover, he could not, after a recovery in that action, bring trespass, although the damages for the trespass in stopping the wagon could not be recovered in the action of trover. Now, in the case before us, the plaintiff elected to sue for the damages he sustained, by the taking of the goods which be-

longed to him as trustee; he recovered these damages; he now seeks a recovery for the damages done to the goods which belonged to him in his own right, because he could not recover them in the suit which had been tried. We will not say whether he could have recovered the entire damages resulting from the trespass or not, in the former suit; but, admitting that he could not, the answer is, he brought his suit on the same cause of action, and by declaring properly, he could have recovered full damages; and though he has recovered less than he was, or might have been entitled to recover, yet he has reeovered on the same eause of action, and it is therefore gone.

In the case of Penny v. Barnes, 17 Conn. 420, a suit had been commenced against an executor, in the name of the Probate Judge, upon the official bond of the executor, and a recovery had been had; a second suit was afterwards commenced, to recover other moneys not recovered in that case, but which, if recovered, would have belonged to, or been paid over to other legatees than those for whose benefit the former suit was brought. To this second action the former recovery was pleaded. It appeared upon the trial of the second suit, that no evidence had been given in the first respecting the money then sought to be recovered. The Supreme Court of Connecticut said, that the material inquiry was not, whether such evidence had been introduced on the trial of the first suit, but it was, whether the present cause of action was essentially the same as the first, and if it was, it was merged in the former recovery. This I am forced to believe the correct rule, although it may operate with apparent hardship in particular cases, for one cause of action can give but one suit, and we cannot split it up into several, because several individuals may be equitably entitled to portions, or to separate parts of the damages. The law ean only look to the legal title and the injury done to it, and if such injury constitutes but one cause of action, and a recovery thereon has been had, then the cause of action is gone, or merged in the judgment, and cannot be kept alive for the purpose of another suit. Such a rule would not only increase litigation, but the judgments of our courts would afford less protection to the defendants. They might, indeed, soon be-

come conclusive of nothing but the mere amount of the recovery, leaving the cause of action on which the recovery was had still in existence.

The principle, I think, is, that where a tort is committed by taking several chattels at one time, it gives but one cause of action, if they belonged to one person, and the chattels were in his possession at the time, and he cannot be allowed to split it up and bring separate suits for separate articles. 15 Johns. 432; 16 ib. 136. Nor can it make any difference, that he was possessed of some as trustee, and of others in his own right, for the legal title to all, and the possession, was in him, and there being but one tort to the possession of one person, it gives, and indeed it can give him only one cause of action, and that is merged when a recovery has been had upon it.

It appears that, notwithstanding the plea of *nul tiel* record was decided against the defendant, he went on to introduce proof to the jury of the recovery set out in his plea, and also proof tending to show that there was but one trespass, and then requested a charge from the court respecting such evidence, which was refused. We need not examine the refusal of the court to give the charge requested, because there was no plea in issue before the jury, under which it could have been admitted. But besides this, the view we have taken of the question raised by the plea of *nul tiel* record, clearly shows our view on the question raised by the charge requested; indeed, it is but the same question presented in a different shape.

It may be that the plaintiff has lost a portion of his rights by the manner in which he has prosecuted his remedy, but we cannot help him without a violation of the rules of law.

Let the judgment be reversed, and the cause remanded.

HUBER *vs.* ZIMMERMAN.

1. Authority to an agent "to settle" does not authorize him to submit to arbitration the matters in dispute.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. L. GIBBONS.

PERCY WALKER, for plaintiff in error:

1. No formal submission, whether written or verbal, is necessary. Matters may be referred to arbitration in any manner that expresses the agreement of the parties to be bound by the award. Russell on Arbitration, 92; 9 Ala. 755; 1 ib. 278. In this case, the letter of the defendant to his son contained ample authority to him to refer the matters in controversy to arbitration. 8 Barn. & Cress. 16.

2. The case of Scarborough v. Reynolds, 12 Ala. 252, is not adverse to this construction of the letter. In that case, it was evident that a *law suit* was in contemplation by the principal, in the event that the agent was not able to effect a settlement in person. Smith v. McGehee, 14 Ala. 404, only affirms the general principle that parol evidence cannot be given of the contents of an award.

GEO. N. STEWART, *contra*, cited and relied on Scarborough v. Reynolds, 12 Ala. 252, and Smith v. McGehee, 14 ib. 404.

CHILTON, J.—This was an action commenced by attachment at the suit of the plaintiff in error against the defendant, to recover the sum of $\$725\frac{3}{10}\frac{1}{0}$, that being the sum alleged to have been awarded the plaintiff by certain persons chosen by the parties to arbitrate the matters of difference between them in respect to their mutual accounts.

It appears from a bill of exceptions signed upon the trial, that the defendant, residing in the city of Philadelphia, and being unable, as he supposed, to effect a settlement with the plaintiff, who resided at Mobile, sent his son to Mobile in order to settle the matter of indebtedness between them. The authority to the son was contained in the following extract

from a letter written to the plaintiff: "You say that I have sent my son to settle with you, and that he knows nothing of the affairs; but he can settle with you as well as I or any other man who knows how to count. If you will do what is right, and have your affairs so plainly written down and entered into the book as I have done mine, then it is easy to settle. I do not keep my business in my head, but in my book. I would not have sent my son, if you had done what was right, or were a man of your word."

Under this authority, the son submitted the matters of account to arbitration by an agreement with the plaintiff, and the arbitrators having found his father debtor to the amount sued for, he (the son) expressed himself satisfied with the award.

The court ruled, that the letter above referred to, gave to the son no authority to submit the accounts of his father to arbitration, and that the award, although consented to by him, was not binding on the principal.

This, it is here insisted, was erroneous.

In Scarborough v. Reynolds, 12 Ala. 252, this court held, that an authority given to an agent in these words: "If you can honorably and fairly settle with Reynolds for me, out of court, do so; if not, let the court and jury settle," did not authorize the agent to make a reference to arbitrators, although the agent was further empowered to exercise a reasonable discretion, and to submit to reasonable sacrifice in order to effect a settlement.

The authority conferred upon the agent to make settlement, &c., was a personal trust, given, it may be, solely in view of the agent's capacity for its performance. The law is well settled, that in such case, unless an authority is expressly given to substitute, the agent has no power to put another in his place and stead. Story on Agency, 14 § 13. Some exceptions, or rather qualifications, in the application of this general rule, have sometimes been allowed in cases where, from the language used, or from a fair presumption growing out of the nature of the business to be transacted, or the usage of trade, it appears that a broader power was intended to be conferred on the agent.

But it is needless to pursue this subject. The case first

cited, of Scarborough v. Reynolds, in our opinion, goes far beyond this as to the general scope of the power conferred, and is decisive of the question involved in this adverse to the plaintiff in error. The authority cited from 8 Barn. & Cress. 16, does not militate against the view here taken; for the power of substitution was there given.

Let the judgment be affirmed.

MARSHALL *vs.* CAUDLER.

1. A petition for a *supersedeas* is demurrable, when the alleged grounds of relief go to matters behind the judgment.

ERROR to the Circuit Court of Sumter.

Tried before the Hon. TURNER REAVIS.

Marshall filed his petition for a *supersedeas* of an execution, issued on a judgment recovered against him by Caudler in the Circuit Court of Sumter. The petition alleges, that, during the pendency of the suit in which said judgment was rendered, Marshall had a settlement with Caudler of the matters in controversy between them, and paid him $499, on which Caudler agreed that he would not further prosecute said suit, except for costs; that Caudler wrote to his attorney to that effect, but, contrary to this agreement, he continued the prosecution of his suit, and, during petitioner's absence from court, obtained judgment against him for upwards of $400; that Caudler is attempting to enforce the collection of this judgment by execution. The prayer of the petition is, that the proceedings may be superseded, that the execution may be quashed, and that satisfaction of the judgment may be entered of record.

Caudler demurred to this petition, and his demurrer was sustained. From this judgment a writ of error is prosecuted, and it is here assigned for error.

HUNTINGTON, for plaintiff in error.

J. O. WILLIAMS, *contra.*

LIGON, J.—The demurrer was rightly sustained, as the grounds set forth in the petition go to matters behind the judgment. Neither the old writ of *audita querela*, nor our writ of *supersedeas*, which is used as its substitute, has ever been allowed to extend to matters arising anterior to the judgment. Holloway v. Washington, 3 Ala. 668; Moore & Cocke v. Bell, 13 Ala. 439.

Let the judgment be affirmed.

SEAY *vs.* GREENWOOD.

1. An action on the case lies to recover the damages actually sustained by the wrongful suing out of an attachment; and if the attachment was sued out maliciously as well as wrongfully, vindictive damages may also be recovered, without, in either case, waiting for the determination of the attachment suit.
2. The costs of the justice's court, before whom the attachment was returnable, are recoverable in case, as part of the damages actually sustained; but where the case is taken by the defendant to the Circuit Court, by appeal, where he files his pleas, and afterwards withdraws them, for a valuable consideration paid him by the plaintiff, and suffers judgment by *nil dicit*, he cannot recover the costs of the Circuit Court.
3. Reasonable and necessary counsel fees expended in the defence of the attachment suit, are recoverable in case for the wrongful suing out of the writ.

ERROR to the Circuit Court of Barbour.

Tried before the Hon. JOHN D. PHELAN.

This was an action on the case, by Greenwood against Seay, to recover damages for the wrongful and vexatious suing out of sundry attachments by Seay against Greenwood. On the trial it was proved, that the attachments were all returnable before a justice of the peace; that Greenwood defended the suits before the justice, and judgments having been rendered against him, he took the cases by appeal to the Circuit Court, and there filed his pleas, which he afterwards withdrew, and suffered judgment by *nil dicit*, in consideration

that Seay would cancel a certain note against him for one hundred and twenty dollars.

The plaintiff offered evidence to show the amount of costs paid by him on the attachment suits, both before the justice and in the Circuit Court, and also the amount of counsel fees expended by him in the defence of the suits. Each divisible part of this evidence was objected to by the defendant, but his objections were overruled, and he excepted.

The court charged the jury, that, if they believed from the evidence that, at the time the attachments were sued out, Greenwood was not on any ground liable to be attached, then the attachments were wrongful, and they must find for the plaintiff the damages actually sustained, though Seay may have acted *bona fide*, and without malice; and that said costs and fees in the attachment suits, including the costs in the Circuit Court, were a proper item of such actual damages. To this charge the defendant excepted.

The defendant, having offered evidence to show the existence of reasonable and probable cause for suing out the attachments, asked the court to charge the jury, that, if they believed there was such reasonable and probable cause, and no malice on his part, they must find for the defendant; which charge the court refused to give, and charged the jury, that, in such case, they should not give vindictive damages. To this charge, and to the refusal to give the charge requested, the defendant excepted.

The only assignment of error is, "the matters and things stated in the bill of exceptions."

BUFORD & PUGH, for plaintiff in error:

1. The declaration is in case, for the wrongful and malicious suing out of the attachments; while the proof shows, that they were wrongful, but not malicious. Upon this proof, under this declaration, the plaintiff was not entitled to recover. At common law, no action lies for the misuse of legal process, unless the party acted from malice; and the statute was designed to enlarge the common law remedy, by extending it to cases where malice was wanting, though the writ was sued out wrongfully. The suit should have been upon the

bond. Donnell v. Jones, 13 Ala. 501; Garrett & Hill v. Logan, 19 ib. 344; Cox v. Taylor, 10 B. Monroe 21.

2. The costs and attorney's fees in the Circuit Court ought not to have been allowed, as a part of the actual damages. Greenwood's appeal and defence in the Circuit Court was wrongful. The costs and attorney's fees were not the natural, legitimate and proximate consequence of the wrongful act of suing out the attachment. Sedgwick on Damages, 74 to 99; 2 Green. on Ev. 210 § 256; 1 Starkie on Slander, 204; 13 Ala. 501; 17 ib. 167; 16 ib. 765; 19 ib. 344; 19 Johns. 241.

3. The notes sued on were actually due, and ought to have been paid. Judgment in the Circuit Court was suffered to go without resistance. The costs and fees were not occasioned by Seay's wrongful act, but by Greenwood's. 1 Starkie on Slander, 205; 2 Starkie on Ev. 466.

4. If attorney's fees were properly allowable to Greenwood, it was only such fees as were necessary and reasonable. The charge given to the jury does not restrict them to these, but directs them to find for "the fees." The case of Garrett & Hill v. Logan, 19 Ala. 344, is conclusive upon this point.

P. T. SAYRE, *contra:*

1. The action is properly brought. The party injured could either resort to his action on the bond or bring case. Kirksey v. Jones, 7 Ala. 627.

2. The proof was, that the attachment was issued before the debts were due; defence was unsuccessfully made before the magistrate; appeal was taken to the Circuit Court. The defendant then succeeded in forcing Seay to give up a note which he held against Greenwood. This shows conclusively that Greenwood had a good defence against a portion of the debt, and as he failed to assert it successfully before the magistrate, he was right to take it to a higher tribunal. If Seay would have agreed to settle the case in the magistrate's court, as he afterwards did in the Circuit Court, the inference is that Greenwood would have been satisfied. His refusal to do so justified Greenwood in appealing, and as this course was forced upon him by Seay's conduct, and the improper action of

the magistrate in deciding against him, the costs and counsel fees in the Circuit Court were proper charges.

3. The notes were sued on before they became due. The presumption is, that Greenwood would have paid them at maturity if he had not been attached. The jury found that the attachments were wrongful, and Seay must therefore be responsible for all the consequences of his own acts.

4. The first charge of the court was correct. The costs and counsel fees, necessarily growing out of this wrongful act, are recoverable. It does not appear that any objection was made to the reasonableness of the fees proven at the trial. It will be presumed, therefore, that they were reasonable, and if the plaintiff in error desired a more special charge, he ought to have called for it.

5. The proof of the costs and fees paid by Greenwood was proper, as evidence to the jury of the actual damage sustained, and if they were not reasonable and proper, it was for Seay to show it.

6. This court has decided, in several cases, that the existence of reasonable and probable cause was no bar to the recovery of damages actually sustained by the wrongful suing out the attachment. Alexander v. Hutchinson, 9 Ala. 825; Kirksey v. Jones, 7 ib. 622; Donnell v. Jones, 13 ib. 490.

The charge, therefore, was right, which said that this only prevented the recovery of vindictive damages.

GOLDTHWAITE, J.—The first question presented is, as to the right of the plaintiff below to recover in case for the wrongful suing out of an attachment. The fifth section of the act of 1837 (Clay's Dig., 61, § 32) provides, that when any original attachment shall have been wrongfully or vexatiously issued, the defendant therein may, at any time, commence suit against the plaintiff, and recover any damages he may have sustained, or to which he may be entitled on account thereof, whether the suit be ended or not. The legislature evidently intended, by the enactment of this statute, to make the wrongful suing out of the process referred to, of itself, a sufficient cause of action, and in such case authorizes the defendant to recover for the actual damages sustained; and, if

the attachment is sued out maliciously as well as wrongfully, to recover vindictive damages, without in either case waiting for the determination of the suit against him. Such was the construction given to this section of the statute referred to in Kirksey v. Jones, 7 Ala., 622, and we are satisfied that the decision was correct.

As to the evidence in relation to the costs in the magistrate's court, it was properly admitted. The costs in that court were the necessary consequences of the act complained of, and, if the act was wrongful, were properly chargeable to the plaintiff in error. But the evidence as to the court cost upon the appeals taken by the defendant in error should have been excluded. These costs cannot be regarded as the necessary consequence resulting from the suing out of the attachment, and, if recoverable at all, it could only be as special damages, and in that case it would be necessary that the declaration should contain the appropriate averment, (1 Chit. Pl., 195–6; Donnell v. Jones, 13 Ala., 490,) and the allegation that the defendant had expended a large sum of money in the defence of the attachments, does not cover the costs on the appeals. But are these costs recoverable at all? In the assessment of damages the rule is, that the natural and proximate consequences of the act complained of are to be estimated, but not those which are merely contingent, and which the injured party could have avoided, (Loker v. Damon, 17 Pick., 284:) and under the operation of this rule, he would not be permitted to charge his adversary with the costs of an appeal, which he had unnecessarily taken. The statute (Clay's Dig., 315, § 16) has made ample provision for the protection of the appellant, by confiding to the court a discretion as to the imposition of the costs, according to the justice of the case, where the appeal is taken by the defendant, and the recovery of the plaintiff is less than the amount recovered before the justice; and unless such amount is reduced on the appeal, the defendant is properly subjected to the costs, which are then to be regarded as the consequences of his own act. In the present case, it appears that the defendant in error received a consideration for the withdrawal of his pleas, and making no defence upon the appeals; but we do not see that he is thereby placed in any better condition as to the recove-

ry of these costs. He has agreed to, and does abandon the defence, and stands, so far as the judgment is concerned, as if he had none to make. The judgment is conclusive upon that question. Jones v. Kirksey, 10 Ala., 839. The admission, therefore, of the evidence in relation to the costs against the defendant in error upon the appeals, was erroneous, under the circumstances disclosed by the record.

As another trial may be had, it is proper to settle the only remaining question, which is, as to the right of the plaintiff below to recover counsel fees expended in the defence of the attachment. In Marshall v. Betner, 17 Ala., 832, we held, that when malice is the gist of the action, and vindictive damages recoverable, counsel fees reasonably and necessarily incurred might be proved, and considered by the jury in the assessment of the damages; but we see no just or sound reason why the consideration of these expenses, in the estimation of damages by the jury, should be confined to cases of malice. If the wrongful act of another renders the employment of a physician or surgeon necessary, the amount paid for their attendance and services is recoverable from the wrongdoer; but if the injured party is compelled, in order to defend his rights or to protect his property, to employ counsel, is he to recover nothing for such expenses, without proof of malice? We understand the object of an action for a tort to be, the indemnification of the plaintiff for the wrong done, and that in such case the defendant is liable for all the damages which are the natural consequences of the act. 2 Greenlf. Ev., 210. If the defendant in attachment allows judgment to go without defence, under the decision in Jones v. Kirksey, *supra*, it is conclusive evidence against him that the amount recovered was due, and he is thus precluded from showing that no debt existed; while if he employs counsel, and by his aid obtains a verdict showing that no debt was due, for the amount thus expended he is entitled to recover nothing, without proving that the party whose wrongful act forced him to incur these expenses was influenced by malice. The true rule we think is, that in either case the expenses for reasonable and necessary counsel fees are to be regarded as entering into the actual damages, and as such are recoverable. We would not, however, be understood as deciding that

such expenses incurred in the action upon the tort itself, are governed by the rule we have laid down. That question is not presented by the record, and upon it we express no opinion.

The judgment is reversed, and the cause remanded.

GRAHAM & ROGERS *vs.* NEWMAN.

1. The assignment of the note or bond which a mortgage is intended to secure, unless there is some contract to the contrary, is an *equitable* assignment of the mortgage; and the assignee of the note or bond may use the name of the mortgagee, to enforce the mortgage at law.
2. But if the mortgage itself is assigned in proper form, the *legal title* of the mortgagee passes to his assignee, and in any proceeding at law to enforce the mortgage the latter must use his own name.
3. If the mortgage is of land, there must be a deed from the mortgagee to the assignee, to convey the legal title to the premises, either on a separate paper, or endorsed on the mortgage with suitable words to convey the thing itself.
4. But if the mortgage is of a personal chattel, the legal title will pass by the mortgagee's assignment of "all right, title and interest, in and to the within mortgage," endorsed upon the mortgage itself; and the assignee must sue in his own name to recover the chattel.

ERROR to the Circuit Court of Montgomery.

Tried before the Hon. GEORGE GOLDTHWAITE.

T. WILLIAMS, for plaintiffs in error.

WATTS, JUDGE & JACKSON, *contra.*

PHELAN, J.—This was an action of detinue brought by Graham & Rogers against Newman for the recovery of a slave. The action was brought in the name of Graham & Rogers for the use of McLemore.

To show title to the slave in question, the plaintiffs introduced a mortgage for said slave, executed by one Pinkston, his owner, to the plaintiffs in May, 1845, to secure a note for $1000, given to them by Pinkston on the same day of the date of the mortgage.

This mortgage was afterwards assigned, by a written as-

signment under seal, regularly endorsed on said mortgage to one Solomon Thompson on 20th March, 1847, and S. Thompson having died, the mortgage with the note was regularly assigned in like manner by Wm. J. Thompson, administrator of S. Thompson, on 12th February, 1849, to McLemore.

The court instructed the jury, that the assignment by plaintiffs to Solomon Thompson conveyed the legal title in the slave to S. Thompson, and that plaintiffs could not maintain this action; and plaintiffs took a non-suit, and assign for error the charge of the court.

The instruction of the court was undoubtedly correct. The assignment of the note or bond it is intended to secure, unless there is some contract to the contrary, is an equitable assigment of a mortgage, and the assignee of the note can, in such case, use the name of the mortgagee to enforce the mortgage at law; but if the mortgage itself is assigned, in proper form, the legal title of the mortgagee passes by it to the assignee, and in any proceeding at law to enforce the mortgage he must proceed in his own name.

If the mortgage is of land, to pass the legal title there must be a deed from the mortgagee to the assignee of the mortgaged premises, either on a separate paper, or endorsed on the mortgage deed, with suitable words to convey the thing itself. 15 Mass., 236; 10 ib., 476; 8 ib., 5; Halsted, 156; 27 Maine, 237; 2 Greenleaf, 322.

But if the mortgage is of a personal chattel, as the mortgage itself may be by writing either under seal or not under seal, and as the delivery of the writing is but symbolical of the delivery of the chattel, the legal title will pass by an assignment by the mortgagee, as in this case, of "all right, title and interest in and to the within mortgage," endorsed upon the written mortgage, and the assignee must sue in his own name to recover the chattel.

The same principle applies to every kind of assignment which passes the legal title. See Bullock v. Ogburn, 13 Ala., 347; 7 Ala., 525; 1 Stewart, 154.

There are other assignments of error, but they need not be noticed, as this error must always be fatal to the action.

Let the judgment be affirmed.

TATE AND TATE *vs.* McCRARY.

1. Before the passage of the act of February 6, 1846, (Pamphlet Acts, 35,) a writ of error did not lie, to review a judgment of non-suit taken with the consent of the plaintiff; and since the passage of that act, the writ only lies where the record shows that the non-suit was taken in consequence of a decision of the court adverse to the rights of the plaintiff in error.
2. Where the judgment entry recites, that "the plaintiffs *voluntarily* suffered a non-suit," and neither the bill of exceptions nor any other part of the record shows that the non-suit was taken in consequence of the ruling of the court, the Appellate Court will not infer that it was taken on account of the ruling of the court adversely to the plaintiffs, from the mere fact that a bill of exceptions was taken to the ruling of the court against the plaintiffs.

ERROR to the Circuit Court of Pickens.

Tried before the Hon. WM. R. SMITH.

This was an action of DETINUE, brought by the plaintiffs in error for the recovery of certain slaves. To show title in themselves, the plaintiffs offered to introduce a certified copy of a deed, which the court, upon the objection of the defendant, excluded. The plaintiffs excepted to the ruling of the court, and tendered their bill of exceptions, which was signed and sealed by the presiding judge; and the plaintiffs then took a non-suit. The language of the judgment entry is as follows, viz: "This day came the parties by their attorneys, and the plaintiffs voluntarily suffer a non-suit. It is therefore considered by the court, that the defendant go hence," &c.

The plaintiffs bring the case to this court by writ of error, and assign for error the matters shown by the bill of exceptions.

ORMOND & NICOLSON, for plaintiffs in error.

E. W. PECK, *contra.*

DARGAN, C. J.—The courts of this State have no right to order a non-suit against the wishes of the plaintiff, and therefore it was, that a writ of error did not lie to review a judgment of non-suit taken with the consent of the plaintiff. This being the state of the law, an act was passed on the 6th

February, 1846, which provides, "that in all cases where it may be necessary for a plaintiff in any proceeding at law to enter a non-suit, by reason of the determination of the court upon a matter of law, it shall be lawful for such plaintiff to move the Supreme Court, at the ensuing term, to set aside such non-suit; when the Supreme Court shall consider the points of law arising upon such non-suit, and set aside or confirm the same, as the law shall be found." The second section provides, that if the record itself does not disclose the points of law upon which the non-suit may depend, such points of law may be exhibited by bill of exceptions, and the party may have his writ of error, as in other cases in which writs of error are allowed by law. Under this act, it is very clear, that if a plaintiff takes a non-suit in consequence of any decision made by the court, he may have such decision reviewed by this court. But, it is equally clear, that it must appear that the non-suit was taken in consequence of the decision; for a voluntary non-suit, not taken by reason of the decision of the court adversely to the rights of the plaintiff, can no more be reviewed by this court, since the act of 1846, than it could have been before the passage of that act. We must, therefore, look to the record, and see from it that the non-suit was taken in consequence of the decision, and if we cannot see this, we have no authority to review the decision.

Applying this rule to the case before us, we cannot review the decision of the Circuit Court, and the writ of error must be dismissed. Neither the bill of exceptions nor the judgment entry, nor, indeed, any part of the record, informs us that the non-suit was taken on account of the decision of the court. We could only infer it from the fact, that there is a bill of exceptions taken by the plaintiff, and then follows the non-suit. But why it was taken, we are left to inference alone; and that inference must be drawn from the fact, that a bill of exceptions was taken to the ruling of the court, and afterwards a non-suit was entered. This we hold to be insufficient to authorize us to review the decision of the court. The record itself should, from its language, inform us that the nonsuit was taken in consequence of the decision.

This view is not inconsistent with the case of Shields v.

Byrd, 18 Ala. 818. The bill of exceptions itself, in that case, clearly showed that the non-suit was taken in consequence of the ruling of the court below; while in this case, we are left to infer it only, from the fact that the record shows that a decision was made by the judge adverse to the plaintiff, and this inference, we think, ought not to be drawn in favor of the plaintiff in error.

Let the writ of error be dismissed.

SIMMONS *vs.* BULL.

1. In the absence of statutory regulations the father is under no *legal* obligation to support his illegitimate child; the statute prescribes the only legal mode by which this support can be obtained.
2. A bill filed by an infant bastard by its next friend, alleging that the defendant was its father, and that he, to avoid the statutory liability for its support, had removed beyond the jurisdiction of the State, leaving property, out of which the bill prays that provision may be made for complainant's support, is without equity.

ERROR to the Chancery Court of St. Clair.

Heard before the Hon. E. D. TOWNES.

This bill was filed by the plaintiff in error, by his next friend, against the defendant. It alleges, that the complainant, an infant, is a bastard, begotten by the defendant, and that he had removed beyond the limits of this State, in order to avoid the statutory liability for its support, leaving property of value in this State, out of which the bill prays that provision may be made for the complainant's support. The Chancellor dismissed the bill for want of equity, and his decree is now assigned for error.

RICE & MORGAN, for plaintiff in error:

The proceeding in bastardy, authorized by our statute, is not strictly of a criminal character. The bond in such case assimilates itself, in its legal effect, quite as much to a bail bond in a civil case, as to a recognizance in a State case. 3

Metcalf 210; 13 Pick. 289; 26 Maine 382; 16 Ala. 600; ib. 804. The appearance of the defendant was not indispensable, to authorize the County Court to determine the question of filiation. He could not at pleasure arrest the course of the court. 4 Ala. 328. The act of 1811 has been so far modified by the act of 1816, as only to make it necessary to submit the case to a jury when the reputed father demands it. 4 Ala. 331; 15 ib. 556.

The statute law of Alabama makes it the duty of the court, if the issue is found against the reputed father, to condemn him to pay not exceeding $50 a year for ten years, "towards the maintenance and education of such child," * * * "so that the same be not paid to the mother of such child." Clay's Dig. 134, § 4. A plea of guilty, or a confession of the act by the reputed father, is equivalent to finding the issue against him. Pruitt v. Judge, 16 Ala. 707. A decree *pro confesso* against a non-resident defendant, is equivalent to a confession of the matter as charged. Arnold v. Sheppard, 6 Ala. 299. Even if it be admitted, that the mother may make a compromise before the issue is tried, that fact would only prove that the proceeding is not a criminal, but only a civil suit.

The right of the child to a sum of money "for maintenance and education" is given by statute, subject only to be compromised before judgment by the mother, who is expected to support and maintain the child. Robinson v. Crenshaw, 2 S. & P. 276. But if there was any such compromise, it must be set up as a defence. The court cannot presume, as against the child, that its mother has compromised away its rights, when the defendant does not say so.

Can the defendant, by his flight alone, defeat the operation of the statute, and the right thereby given to the child? Is the statute to be confined only to that class of persons who are willing to remain here, to answer the violated law? Shall the absconding offender gain the mastery over the law, while his property is here in the power of a court of chancery? Shall no order or decree be made to subject this property to "the maintenance and education" of the child, when all the defendant's rights will be protected by the usual bond in favor of non-resident defendants? Clay's Dig. 353 § 45; 9 Ver.

134. Whenever the law gives a right to any property, or to its enjoyment in future, and all remedy at law is destroyed by the voluntary act of a wrong-doer; and when there will be a failure of justice, and irreparable injury, without the aid of a court of equity, that court will exercise its transcendant powers. Reavis's Dig. 247 §§ 153 *et seq.*

Where a wife had filed a bill for alimony, &c., against her husband, and it appeared that he had abandoned her without any support, and threatened to leave the State, the court, on the petition of the wife, granted a writ of *ne exeat* against him. 1 Johns. Chan. R. 264. The Court of Chancery has power to aid a judgment and execution creditor, to discover and reach the property of his debtor, whenever it has been put out of the reach of an execution at law. 20 Johns. 554; 5 Johns. Chan. R. 280; 4 ib. 687. A complainant who, by accident, is prevented from obtaining relief at law, where he has it complete, may be relieved in chancery. 2 Hen. & Mun. 10. As to what is meant by "accident" in a court of chancery, see Story's Eq. Juris. § 78; Jeremy's Equity, B. 3, Part 2, 358.

WALKER & MARTIN, *contra:*

The father is under no legal obligation, at common law, to maintain his illegitimate offspring. His liability is only of statutory creation, which prescribes the remedy to be pursued; and none other can be. 16 En. Com. Law R. 302; 19 Wend. 405; Kent's Com. vol. 2, 215. The statutory remedy is strictly penal, and must be literally pursued. 22 Ver. 543.

The obligation of the father to maintain his legitimate children, results from his right to their custody and services; while he can exercise no authority or control over his illegitimate children. Kent's Com. 2 vol. 215; 8 N. Hamp. 417; 6 Ala. 501; 17 ib. 14.

CHILTON, J.—This was a bill filed by an infant by its next friend, charging that it was a bastard, begotten by the defendant, who, to avoid the statutory liability for its support, has removed beyond the jurisdiction of this State, leaving property belonging to him in the county of St. Clair. The bill prays that publication may be made, and that provision

may be made for the support of the infant out of the property of the defendant. The Chancellor dismissed the bill for want of equity.

At the common law, a bastard was said to be *filius nullius*. His natural father may die never so rich, and he may be upon the parish, yet he took none of his estate, unless left to him by will. In the absence of a statute, the father is under no legal obligation to support him; and the statute prescribes the mode, and the only mode, by which this support can be obtained. The case before us shows the necessity for further legislation on the subject. Our duty, however, is plain; as we have no power to make, but only to administer the law, and there is no provision of either the common or statute law authorizing this proceeding, the Chancellor properly dismissed the bill, and his decree must consequently be affirmed. See 16 Eng. Com. Law R. 302; 19 Wend. 405; 2 Kent 215.

Decree accordingly.

ESLAVA ET AL. *vs.* LEPRETRE.

1. The Orphans' Court has no jurisdiction to declare a person a lunatic, or *non compos mentis*, and to appoint a guardian for him as such, without the issue of a writ *de lunatico inquirendo*, and the finding of a jury thereon; and if a guardian is appointed for a person, as being *non compos mentis*, without these preliminary proceedings, the appointment is void, and may be impeached in any court, in a collateral proceeding in which a party seeks a benefit under it.
2. A party is entitled to notice of proceedings against him in the Orphans' Court, to declare him *non compos mentis*, and to appoint a guardian for him; and the appointment is void, if made without notice.
3. Where a bill is filed to foreclose two mortgages on land, one executed by the mortgagor and his wife jointly, and the other by the mortgagor and the wife's guardians, who were irregularly appointed by the Orphans' Court, without the issue of a writ *de lunatico inquirendo*, upon the mere petition of her husband, alleging that she was *non compos mentis;* and the guardians are made parties to the bill, but the wife is not—it is error, to proceed to a final decree, until the wife is properly brought in; nor can the complainant excuse his neglect in failing to proceed regularly against her, by setting up her want of interest in the mortgaged property; nor is the error cured by the subsequent appointment of a guardian *ad litem* for her.

(Chilton, J. *dissenting*, held, that the wife was not a necessary party to the bill, as the court could not, by any decree rendered in the foreclosure suit, affect her right to dower in the mortgaged premises.)

4. It is erroneous to render a final decree against a non-resident defendant, who has not answered, or otherwise submitted to the jurisdiction of the court without the execution of the bond required by the statute, (Clay's Digest, 353, § 45,) although a decree *pro confesso* has been regularly entered against him on notice by publication.
5. All assignments of error should point to a particular part of the proceedings of the court below, in which the error complained of is thought to exist; an assignment is too general which alleges, that "the bill and amended bill were not sufficient to warrant the proceedings had on them;" so also, "that the proceedings were irregular, informal and insufficient, and not in accordance with the rules of Chancery Practice."
6. In a foreclosure suit, if the defendants, being adults, do not suggest to the court that the mortgaged premises greatly exceed in value the amount of the mortgage debt and are capable of sub-division, and move for a reference to the master to ascertain these facts, the Chancellor may well go on, and decree a sale of the whole of the mortgaged premises; and this, notwithstanding there are two mortgages, between the same parties, for the same debt, and differing only as to the premises conveyed.
7. But a different rule would prevail, if any of the defendants were infants, persons *non compotes mentis*, or under any other legal disability which would prevent them from appearing, and contesting the matter with the complainant.
8. It is discretionary with the Chancellor to allow time for the payment of the sum reported by the master to be due on the mortgage debt; he may decree a foreclosure and sale absolutely, without giving day to the mortgagor, and such decree will be free from error.
9. It is irregular to take any order in a chancery proceeding, generally affecting the merits of the case, until it is at issue as to all the parties; if the person not before the court is regularly made a party, by proper allegations and prayer for subpœna, the irregularity cannot be excused by the supposition that he is not a necessary party.
10. A wife is not entitled, as against the mortgagee, to dower in lands which are conveyed to her husband, and by him on the same day mortgaged to his vendor, to secure the payment of the purchase money.
11. The wife's right to dower in lands aliened by her husband during coverture, can only be relinquished by herself in person.
12. An agreement between mortgagor and mortgagee, made contemporaneously with the loan, that the interest shall be converted into principal as it becomes due, is oppressive, unjust and tending to usury, and cannot be supported in equity; but after interest has accrued, it then becomes a debt, and may, by subsequent agreement, be considered a part of the principal, and thenceforth bear interest, provided, there is no extortion on the part of the mortgagee.
13. If the interest runs in arrear, and rests are made from time to time in the mortgagee's account of arrears, on which interest is calculated, and finally a general account of all arrears is had, calculated on the footing of the previous rests, which is signed by the mortgagor, and secured by a second deed of mortgage, although executed after the lapse of several years, the transactions are

not usurious; and equity will charge the mortgaged premises with the payment of the sum so found due, where there is no conflicting lien, or subsequent incumbrance on the property, at the time of this settlement.

14. Where the mortgage debt is created in this State, and the mortgagor, being unable to pay it, afterwards agrees to pay ten per cent. interest, as an indemnity to the mortgagee for interest paid by him on money borrowed in Louisiana, at a higher rate of interest than is allowed by the laws of this State, the agreement is oppressive and unjust, and will not be upheld in a court of chancery.

15. If a mistake is made upon a general accounting between mortgagor and mortgagee of all arrears of principal and interest, in consequence of which the new note and mortgage are taken for less than the amount actually due according to the basis on which their calculations are made, the sum thus omitted through mistake cannot be considered a part of the mortgage debt, as against a subsequent mortgagee, or a purchaser of the equity of redemption, whose rights intervene before the mistake is discovered and corrected.

ERROR to the Chancery Court of Mobile.
Heard before the Hon. J. W. LESESNE.

John B. Lepretre exhibited his original bill against Miguel D. Eslava, and Adrian S. Dumie and Ovid Mazange, guardians of Louise Eslava, wife of said Miguel, setting forth, that on the 10th day of September, 1835, M. D. Eslava and Louise his wife, being indebted to him in the sum of $67,776 $\frac{15}{100}$, payable at various times, and in various amounts, as set forth in said bill, made to him a mortgage of an interest of three-fourths in a certain lot in the city of Mobile, as security for the payment of said debt; that the sum thus due, and secured, was for the purchase money of said lot, which was conveyed to Eslava by complainant and wife, by deed bearing even date with the mortgage; that all the notes given by Eslava for the purchase money, and secured by the mortgage, have been fully paid, except the last, which is for the sum of $18,414, which was due on the 7th day of September, 1839; that subsequent to the delivery of the mortgage aforesaid, Louise Eslava became *non compos mentis*, and Adrian S. Dumie and Ovid Mazange were, by the Orphans' Court of Mobile, duly appointed her guardians.

The bill further charges, that on the 30th of January, 1845, M. D. Eslava, being indebted to complainant in the sum of $23,402 $\frac{29}{100}$, made to him another mortgage to secure the payment of that sum, in which said Eslava was joined by Adrian

S. Dumie and Ovid Mazange, as guardians of Mrs. Eslava. By this last mortgage the remaining one-fourth interest in the lot conveyed by the first mortgage was conveyed to complainant, with another lot in the city of Mobile, described as lying at the north west corner of Government and Royal streets, fronting on Royal street, and south of the lot formerly conveyed by the first mortgage mentioned in the bill; that the latter mortgage was intended as an additional security; that, at the date of the last mortgage, there remained due, of the money secured by the first, the sum of $23,402\frac{50}{100}$; that this sum is wholly unpaid. The bill prays that Eslava, "and Adrian S. Dumie and Ovid Mazange, guardians of Louise Eslava, wife of M. D. Eslava, may be made defendants;" that subpœna issue to them; that the equity of redemption be foreclosed, and the lots sold to satisfy the mortgage debt of complainant.

The mortgages are made exhibits to the bill, and are fully set out in the record. The execution of the first mortgage was acknowledged by Eslava and wife before a notary public, and duly certified for registration. The execution of the second mortgage is also acknowledged by M. D. Eslava, and Adrian S. Dumie and Ovid Mazange, as guardians of Louise Eslava.

Subpœna issued, and was returned by the sheriff executed on Eslava, Dumie and Mazange, to the two latter of whom it was directed as guardians of Louise Eslava.

Miguel D. Eslava answers, denying that his wife Louise was indebted to the complainant in any sum whatever; admits that he (respondent) was indebted to complainant in September, 1835, in a large sum of money, which was secured by divers notes of respondent, and sundry other persons, transferred to complainant; and that said complainant then held two notes on respondent, one for $16,791\frac{62}{100}$, and the other for $18,414, as set forth in the bill; he admits making the mortgage to secure the sums mentioned in it, on the property described by it; but denies that the mortgage is correctly described in the bill, so far as it relates to the note for $18,414, and denies making the condition concerning that note, as it is charged in the bill. He admits that all the notes set out in the mortgage have been paid, except the one for

$18,414, which, with its interest, has not been fully paid; that the mortgage was made when property was high, and money abundant and easily obtained; that soon afterwards a general bankruptcy ensued, and he was unable to meet punctually his several liabilities to complainant; that he was compelled to apply for an extension of time on a part of the mortgage debt; that an extension was granted by complainant, but he required additional security, and demanded usurious interest; that complainant has, in his accounting with respondent about his debt, since that time, compounded interest at 8 per cent., and charged 2 per cent. over and above the legal rate for his forbearance and giving day of payment, and has even compounded the interest at 10 per cent., and pretends that he holds an agreement made by respondent which justifies it, made simultaneously with the second mortgage. He admits that the original mortgage is signed by Mrs. Eslava, but denies that it has any validity as to her. He admits making the second mortgage on the 30th January, 1845, but says it was made to procure an extension of the time for the payment of the debt. He admits that, in the recitals of this mortgage, the debt is set down at $23,402\frac{29}{100}$; but denies that so much was really due complainant, and says it was made up partly by compounding the interest, and partly of usury charged for giving day of payment. He alleges, that he has paid, on the notes due from him to complainant, large sums of money, and has otherwise with property, and in accepting drafts drawn by complainant, paid him $35,679\frac{52}{100}$ towards the notes for $16,700\frac{62}{100}$ and $18,414; that, as agent for complainant, he has paid out of his own funds $2,946\frac{30}{100}$, for filling up a lot belonging to complainant, and he insists that this sum should be allowed him as a credit; that he has paid the principal and part of the interest on the debts intended to be secured by the mortgage, and only a small sum remains due; that, all just credits being allowed, this sum amounted in April, 1849, to $6,540, and no more.

In further answering he says, that the lands mentioned in the deed of mortgage greatly exceed in value the amount due complainant, and in 1845 respondent, being indebted to Don Gregorio Funes y Munos in about the sum of $29,000, made to him a mortgage on said premises to secure the pay-

ment of said sum of money; that on the 30th January, 1845, respondent made a lease to one Chantron for part of the premises for six years, with the assent of complainant; that since the making of said mortgage and lease, he has sold to Ovid Mazange his entire interest in said premises, and that he now claims no interest whatever, having conveyed his equity of redemption to said Mazange. He insists that the last deed of mortgage is not binding on his wife Louise Eslava, as she never executed it, and Dumie and Mazange, who executed it as her guardians, had no authority to bind her. He insists that Dumie and Mazange are not fit persons to represent the interests of Louise Eslava (who is yet a lunatic) in this suit, as their interests conflict with hers, the former being the agent of complainant in conducting this case, and the latter, the present owner of the equity of redemption in the premises.

The subpœna having been returned executed on Dumie and Mazange as guardians of Louise Eslava, and they having failed to answer, a decree *pro confesso* was entered against them at the April term, 1849, and the cause was continued, with leave to complainant to amend his bill.

The amended bill charges, that the debt secured by the two mortgages named in the original bill was the individual liability of Miguel D. Eslava, and not the debt of Louise Eslava; that the date of the note for $18,414 is incorrectly stated in the original bill; its true date is 7th September, 1835; that the original debt secured was due to complainant from M. D. Eslava for the purchase money of the lot named in the first mortgage, and on no other consideration; that the deed made by complainant to Eslava for the premises, and the mortgage from Eslava and wife to complainant, were contemporaneously executed. He insists that his lien is superior to any right of Mrs. Eslava in the premises; that subsequently to the making of the second mortgage, complainant and Eslava entered into an agreement, which is exhibited with the bill, by which Eslava was to assign to complainant the leases taken from tenants who occupied the premises; and the rents reserved in said leases, after paying certain claims and expenses in said agreement mentioned, were, for four years, to be applied to the payment of

the mortgage debt, and during this time complainant was not to resort to his legal or equitable remedies on his mortgage; that annual rests were to be made in the accounts between the parties, balancing the interest account, and converting interest into principal once a year, and not oftener; that this agreement was not to impair the mortgages as securities; that, needing money in Louisiana, complainant very reluctantly agreed to extend the time; that complainant requested Eslava to act as his agent in receiving the rents, and in the management of the property, and for this purpose handed him the leases which had been assigned to the complainant; that Eslava undertook such agency, and agreed to account to complainant in the capacity of agent; that Eslava took the rents and profits to his own use, and has refused to account as agent; that, for more than a year after the term of four years had expired, and for some time previous to the filing of the original bill in this case, Eslava assumed a hostile attitude towards complainant, and wholly refused to account as agent, or under the agreement aforesaid; that up to November, 1847, Eslava made various remittances and payments to complainant, for which he has received credit, but there still remains about $20,000 of the mortgage debt unpaid; that, in consequence of the indulgence extended to Eslava, complainant was compelled to borrow money in Louisiana, the State of his residence, at 9 per cent. per annum, payable in advance, with an annual renewal of the note; that the bank from which he borrowed is allowed by its charter to charge interest at that rate; that, in view of this, Eslava, on the same day on which the other agreement was made, but after it had been signed, voluntarily agreed to pay complainant 2 per cent. additional interest, on all sums he might thus be compelled to borrow.

The bill further charges, that complainant is informed and believes that Ovid Mazange, Don Gregorio Funes y Munos, William F. Bartly, Chapman Coleman, Pepin Chantron, and James S. Deas claim some interest in the premises, or in some portion of them, and prays that they be also made parties. It also prays that a receiver be appointed.

On the bill as amended subpœna issued, and an order of publication was made and executed as to Don Gregorio Funes

y Munos, as to whom a decree *pro confesso* was taken. A decree *pro confesso* was also taken, on service of subpœna, against Ovid Mazange in his own right, and as guardian of Louise Eslava, on the 7th January, 1849. The subpœna was returned "not found" as to Jas. S. Deas.

No other order appears to have been taken in the case until the January term, 1850, when the court appointed Wright C. Stanley guardian *ad litem* for Louise Eslava, and ordered him to answer within thirty days. At the same time an order was made dismissing the bill as to A. S. Dumie and Ovid Mazange, guardians of Louise Eslava, upon the ground that they were improper persons to represent her interest, by reason of their interest in the subject matter of the suit. This dismissal was by consent.

To the amended bill Miguel D. Eslava filed his answer, in which he admits entering into the agreement as set forth in the complainant's amended bill. He admits, that he was to rent the premises, and remit an amount equal to the rents annually to complainant, for the term of four years mentioned in said written agreement; that he did account to complainant annually for such sums, and pay them to him, or on his account to others; that "he used great caution in renting and leasing the premises, but notwithstanding this, loss was sustained by the failure and inability of some of the tenants to pay their rents." He denies that complainant was ever put in possession of the mortgaged premises, or that such was ever the purpose of the agreement.

He insists that the second agreement mentioned in the bill, dated 5th February, 1845, allowing complainant to demand 10 per cent. on the mortgage debt, or such portion of it as is mentioned in it, was part and parcel of the contract for forbearance for four years, and was drawn as it is by advice of counsel, and was a shift or device to avoid the usury laws of Alabama: that the interest thus reserved is usurious; that even before this agreement was entered into, the complainant had charged usurious interest in his annual accounts respecting the mortgage debt, and by this means the amount had been swelled to the sum of $\$23{,}402\frac{39}{100}$ at the time the last mortgage, and the agreements mentioned in the amended bill, were executed; that these agreements were entered into by

him, not willingly, but to prevent a foreclosure and sale under the first mortgage, at a time when he was unable to pay the mortgage debt, and the property was likely to be sacrificed; under this constraint he agreed to pay 10 per cent. per annum for forbearance for four years. He knows nothing of complainant's being compelled to pay 9 per cent. for the loan of money in Louisiana, and never agreed for any such consideration to pay him 10 per cent. in Alabama. He denies that the sum stated in the note dated 4th February, 1845, is really due, or was due at that time, upon an honest and legal accounting between complainant and himself. He denies that he ever abused any trust reposed in him by complainant.

Mazange answers, stating that, in 1849, he purchased of Eslava the fee simple of the lands named in the mortgages, and received from him a deed for the same, which was duly recorded, and is exhibited with his answer; that of his own knowledge he is not informed of the matters complained of in the original and amended bills of complainant. He admits that the lands mentioned in complainant's mortgages are a part of the lands afterwards sold and conveyed by Eslava to this respondent, and he is informed and believes that Eslava is considerably indebted to complainant; that he is willing and ready to pay to complainant whatever amount may be really due on his mortgages; that the mortgage premises are worth much more than the sum so due. Stanly, as special guardian of Mrs. Eslava, answers, denying the allegations of the bill and amended bill, and calling for proof. A decree *pro confesso* is rendered against Don Gregorio Funes y Munos.

Bartly and Coleman answer jointly, admitting the mortgages set forth in the bill and amended bill, and that a considerable sum is due on them; are ignorant of the other matters set forth in the bill; that they are interested under a subsequent mortgage made on the premises by M. D. Eslava to Don Gregorio Funes y Munos, including the premises, which they are ready to produce, and they claim whatever balance may remain on a sale of the lots, after satisfying complainant's demand.

Chantron answers, that he knows nothing except from information, of the several matters contained in the bill; that

he leased from M. D. Eslava a part of the mortgage premises for the term of six years, and was put in possession by him; that he erected a building thereon of the value of $6,000; that he afterwards conveyed the lease-hold premises, with the consent of M. D. Eslava, to Adrien S. Dumie in trust to pay certain debts named in the deed of conveyance which is duly recorded; that his lease-hold interest was sold by Dumie under the deed, and Thomas A. Hamilton became the purchaser, but no conveyance was made to him; that James S. Deas obtained a decree against respondent on a builder's lien, and his term in the lease was decreed to be sold to satisfy said lien, but no sale has ever taken place; that said Deas took possession of the lease-hold premises, and shortly afterwards the building was totally destroyed by fire; that since the burning Deas has released all his right to one Reid.

On the 2d April, 1850, the decree *pro confesso* against Chantron was set aside.

At this stage of the proceedings the Chancellor, at the April term, 1850, made an interlocutory decree, referring the accounts between the parties to the master, ordering him to report thereon under the following directions:

1. That he report the amount due on the mortgages, at simple interest, without reference to the settlement made between Lepretre and Eslava referred to in the articles of 4th February, 1845;

2. That he report the amount due on said mortgages, noting the sum received by the parties in their articles of agreement of the 4th February, 1845, to ascertain the amount due at the time named in said articles of agreement, with simple interest calculated thereon;

3. That he state the account, and ascertain what is due, upon the principles agreed on by Lepretre and Eslava in their articles of agreement of the 4th February, 1845, and the contract of Eslava to pay two per cent in addition to lawful interest on his debt due to Lepretre;

4. That he report the amount, if any, which Eslava is entitled to claim of Lepretre for filling up the lot in the pleadings named, and also all sums of money that Eslava should be charged with for rent and enjoyment of said lot;

5. That the parties have leave to take further testimony, and examine witnesses before the master;

6. All questions arising on the testimony and pleadings are reserved until the hearing, and leave is given to apply for further directions.

The master proceeded to state an account under this decree, which was signed on the 30th January, 1851. To this report Eslava and Mazange filed exceptions. At the April term, 1851, the Chancellor pronounced his final decree, and set aside the master's report, because, as he says, "it is admitted on both sides that the master's calculations are not accurate; there must be another reference, and the exceptions therefore to the report he has made need not be noticed."

He then makes another order of reference, accompanied with further directions to the master. These are, that the sum of $\$23,502\frac{29}{100}$ due on the 7th day of February, 1845, be taken as the basis of the account, and that interest, at the rate of eight per cent. annum, be allowed on said sum until the first payment, when that payment will be deducted, first paying interest, and then principal, and so on until all the payments are allowed, and that he report the balance due on the mortgage after such accounting.

In the report which he made under the first order of reference, the master allowed to Eslava a credit of $2011 34 for filling up a lot, belonging to complainant, the work having been done by one Dealy, under a contract with Eslava. In the accounting under the last order, this item was excluded altogether, and the master refused to hear proof concerning it. On this last accounting the master reported a balance due the complainant amounting to $19,752 87.

This report was made on the 17th April, 1851, and confirmed on the 19th of the same month. No exceptions are reported by the master as having been taken before him. It appears, however, in the recitals of the decree of foreclosure, that, after the report was made, and on the day of its confirmation by the Chancellor, the defendants moved the court to allow them further time to file exceptions, which was refused by the court, and the report, as it came from the mas-

ter, was confirmed. The Chancellor then proceeds to establish the debt of complainant for the sum so reported, as a prior lien on the mortgage premises, and continues, "and that said defendants, on or before the 30th day of April instant, do pay to said plaintiff the sum of $——, so reported by the master to be due on said mortgage, with the interest and the cost to be taxed in said cause. And in default of the payment as aforesaid, the master is directed, reserving the right of dower of the defendant Louise L. Eslava, wife of said Miguel D. Eslava, in and to the premises described in the second deed of mortgage executed to the plaintiff, and dated on the 31st day of January, 1845, as to which last mentioned premises the right of dower of the said Louise L. Eslava is reserved to her, and reserving all rights that may be outstanding against the said plaintiff, under and by reason of the indenture of lease between the said Miguel D. Eslava and Pepin Chantron, in the pleadings described, to proceed and sell the lands described in the two deeds of mortgage, in the pleadings mentioned, at public auction, in front of the courthouse of Mobile county, and between the usual hours of sheriff's sales, first giving due and legal notice of the time and place of said sale, by advertisement once a week for thirty days previous thereto, in some newspaper printed and published in the city of Mobile, and posting notice on the courthouse door of said county. In all respects, the master, in conducting said sale, will be governed by the same rules and regulations as govern sheriffs in the sale of like property under execution. And from the proceeds of said sale the register will first pay and satisfy the complainant's debt, with interest, and the costs of suit, and any balance remaining in his hands he will bring into court, to abide its further order and decree, and what he shall have done in the premises, he will report at the next term of this court."

From this decree a writ of error is sued out by the defendants in the court below, and they here assign for error:

1. That proper parties were not made to the bill, before the decree was rendered;

2. That there was error in all the proceedings in reference to Mrs. Louise L. Eslava, as she was never properly brought before the court;

3. The court erred in appointing a guardian *ad litem* for Mrs. Eslava, and said appointment was irregularly and improperly made;

4. The decree absolute against Don Gregorio Funes y Munos is erroneous;

5. The court erred in decreeing against Bartly and Coleman;

6. The decree and order of reference of the 15th of April, 1850, is irregular and erroneous;

7. The court erred in the decree and order of reference made at the December term, 1850;

8. The court erred in making the final order of sale on the 19th of April, 1851;

9. The court erred in ordering a sale of the whole mortgaged premises, when they were capable of being sold in parcels, under the separate mortgages, and a part only was sufficient to pay the mortgage debt;

10. The court erred in making the decrees of reference at different times, and in making the second when the first was undisposed of;

11. The court erred in proceeding under the second order of reference without deciding the questions arising on the exceptions to the master's report under the first, and in treating the first order of reference as a nullity without having regularly reformed or set it aside;

12. The court erred in its opinon and decree as to the proper method of computing the interest;

13. The court erred in decreeing the premises under the second mortgage to be sold to satisfy a debt of $23,502 29, when the debt secured by it was only $23,402 29, and it was error to charge the premises with the payment of a greater sum;

14. The court erred in rendering a final decree on the coming in of the master's second report before two entire days had elapsed, and in refusing to extend the rule for excepting to said report until the expiration of said two days;

15. The final decree of the Chancellor is imperfect and erroneous in this, that it does not specify the sum for redeeming the property mortgaged;

16. The court erred in directing a sale so soon after the decree;

17. The court erred in decreeing a sale and payment to the complainant, without requiring the bond required by the statute;

18. The court erred in confirming the master's report, and founding its decree thereon, which made no allowance to Eslava for filling up the lot of Lepretre, when such allowance had been made in a former report, which had never been vacated or set aside on exceptions regularly taken;

19. The court erred in not charging complainant with the rents and profits while he was tenant in possession of the mortgaged premises;

20. The court erred in decreeing for the the complainant, notwithstanding the objections of the defendant to the master's report;

21. The court erred in decreeing against the defendant Chantron as shown in the record;

22. The court erred in rendering the several decrees *pro confesso;*

23. The court erred in confirming the master's report, when the same was improper and erroneous on its face;

24. The court erred in decreeing against Jas. S. Deas as shown in the record;

25. The court erred in ordering the defendants to pay all costs by its order of the 21st January, 1850, as shown by the record;

26. The court erred in rendering the final decree, as the same is not authorized by the pleadings and proof;

27. The court decreed for more than was lawfully due;

28. The bill and amended bill were not sufficient to warrant the proceedings had on them;

29. The proceedings were irregular, informal and insufficient, and not in accordance with the rules of Chancery Practice.

The complainant below assigned cross errors, and in his assignment objected to the decree, because the Chancellor decreed to complainant a less amount than the proof showed to be due.

GEO. N. STEWART, for plaintiffs in error.

P. HAMILTON, *contra:*

1. The record shows that all necessary parties were brought regularly before the court by personal service or publication, and all parties that are affected by the decree have answered. Munos is not a necessary party, and his interest has been transferred to Bartley & Coleman, who have answered. But the publication and decree *pro confesso* are regular. 16 Ala. 233; 17 Ala. 738.

2. In this case it was not necessary to serve process personally on Mrs. Eslava. No separate estate was involved. 8 Ala. 605. Being a lunatic, with guardians, service upon the guardians or committee was all that was necessary. 2 Dana, 455; 2 Johns. Ch. 242.

3. Eslava having suggested to the court, that the guardians were improper persons to act, the Chancellor acted correctly in appointing a guardian *ad litem.* 1 Danl. Ch. Pr. 203; 1 Smith's Ch. Pr. 262; 2 Dana 455. As to property described in the first mortgage, she had no right to dower as against complainant. 4 Kent 38, 39; 4 Mass. 566; 15 Johns. 458; 15 Peters 21. As to property conveyed by second mortgage, her rights are reserved by the decree.

4 & 5. Munos and Bartley & Coleman were properly made parties defendant, though they were not necessary parties. 5 Ala. 167; 6 Ala. 452; 14 Ala. 38. They filed no cross bill, and if not properly in court, no harm is done; they are not precluded by the decree.

6. The reference of 15th April, 1850, was made when the case was ready for a decree, and evidently made to speed the cause, and to assist the Chancellor in arriving at the proper mode of stating the account. It was made by consent. Even if prematurely made, it is not error. 15 Ala. 61.

7, 10 & 11. The second order of reference was made after argument, and upon admitted error in the first report, which was before the court for a decree. This second order of itself overrules the first, and in terms purports to do so, and for reasons stated in defendants' exceptions. In analogy to practice in cases of reversal, this new order of reference is correct. 16 Ala. 616.

14 & 20. Two entire days elapsed between report and con-

firmation; it is so stated in the decree. The report is dated 15th April, endorsed read 17th, confirmed 19th April, 1851. It is plain from the order of confirmation, that exceptions had not then been made; for a motion to enlarge time in order to file exceptions was overruled by the Court. To grant or refuse such a motion was necessarily in the discretion of the Chancellor.

15. The decree is not imperfect as to the amount to be paid; it recites the report showing $19,752 $\frac{37}{100}$, to be due 15th April, 1851; though, probably to save labor, the report is not copied a second time, it appearing in the two preceding pages to which reference is made. Though a blank does appear in that part of the decree which orders payment to be made before sale, no mistake could exist as to the amount. 4 Ala. 187.

16. The time for payment is long enough; long day is not favored. 8 Porter, 277.

21 & 24. Deas and Chantron claim under a lease; they were not necessary parties, nor were any of the lessees. Story's Eq. Pl., § 151. Besides, all rights under lease are reserved by the decree. 15 Ala. 98.

25. The order as to the payment of costs and continuance of the cause was within the discretion of the court. Clay's Dig. 350, § 26; 15 Ala. 779; 7 Ala. 927; 5 ib. 551; 7 Port. 244.

19. Complainant agreed to go into possession and apply rents to the debt; he placed Eslava in possession as his agent, and credits the debt with every cent received; and there is no dispute about items of payment. Most of these payments were derived from rents collected by Eslava. Complainant agreed to wait four years without suit; Eslava, however, faithlessly repudiated the agreement. There is not an honest pretence in which this assignment of error can rest.

13. The facts are, the second mortgage calls for $23,402 $\frac{29}{100}$, as due 7th February, 1845. An error was made by the parties in the addition of certain credits; as shown in the testimony, the figures $1266 $\frac{43}{100}$, should be $1166 $\frac{43}{100}$. The proper credit added to other items, and all then subtracted, from the debt $27,958 $\frac{37}{100}$, makes the true amount $23,502 $\frac{29}{100}$. The account shows the error, and the letter of Eslava, of 15th April, 1845, admits it. The error was admitted to exist at

the time of making the first report. In this way it came about, that the sum of $23,502 $\frac{29}{100}$ was taken as the basis of the Chancellor's decree. If this be deemed an error on which to reverse, the defendant in error now offers to credit the debt, with that amount and interest.

18. As to the credit claimed by defendants for filling lot of complainant, that is an independent demand. That item was referred to the master by consent, at first report, when all the questions in bill and answers were referred. If this item can be at all looked to, it must be under articles of agreement, 4th April, 1845. But the defendant succeeded in excluding that agreement from entering into the account, and certainly should not be permitted to take advantage from it now; besides, the exception was not presented to the court, as it should have been.

9. As to order of sale of the whole property, there are no infant defendants. Mrs. Eslava's rights are fully protected by the decree of the court. The other defendants are adult and sane, and are not entitled to make the objection. 2 Ala. 415; ib. 149.

17. This point seems fully covered by the decisions. Bartley & Coleman submitted by answer. 9 Ala. 179. They were holders of the mortgage to Munos. Munos was not an indispensable party; the decree would be perfect without him. 14 Ala. 48; 6 Ala. 452.

22. The decrees *pro confesso* are regular, as to Munos, the only non-resident. 16 Ala. 233; 17 Ala. 738. The decrees recite that service was effected. The return as to Deas is not found in the record—but he only had a claim under the lease to Chantron, and was not a necessary party.

23. If there be any errors in the report of the master, they only go to errors in calculation of interest, and can be amended in this court. The complainant submits to any and all corrections of errors in the calculation of interest by the master.

The remaining assignments present the principles of the decree granted by the Chancellor for revision by this court. At or about the time of the execution of the second mortgage, Eslava and complainant came to a settlement, with regard to their debt. At that time, (January, 1845,) no third party's

interests were affected. Upon their settlement, there was agreed to be due complainant on 7th February, 1845, the sum of $23,402 29. It is contended that, in whatever way that amount was arrived at, there is no pretence of usury, even if interest past due had been compounded. Eslava and those claiming under him are estopped by that settlement and deed. The settlement became an account stated. Mitf. Eq. Pl., 259 ; Adam's Eq., 226, Law Library.

An agreement to pay interest on interest past due, on settlement of an account, has been uniformly supported. 2 Young & Col., 92 ; 23 Pick. R., 167 ; 6 Johns. Chan. R., 313 ; 5 B. & Ald. R., 34; 9 Vesey R., 224 ; 3 Wash. C. C., 350 ; 1 N. H., 169 ; 1 Johns. Chan., 13 ; 4 Yeates R., 224 ; Coote on Mortg., 431, &c. ; 3 Powell Mortg., 909 a ; 1 Wend., 521 ; Cam. & Nor., 357 ; 4 Term R., 613. Here was an amount arrived at upon the settlement, and fixed as the debt due. It was in writing, and referred to and treated as part of the mortgage debt, and answers all the requirements of the strictest rules. Coote on Mortg., 431 *et seq.*, Law Library.

The defendant succeeded in repudiating the mode of keeping the accounts provided by the articles of agreement of 4th February, 1845, so far as it made against him ; surely it would be inequitable to permit him to set that agreement up, where it would benefit him, by allowing him interest on the payment made on the debt. Most of the payments made were from rents, that Eslava agreed to receive and remit as agent of complainant.

LIGON, J.—In settling the law arising upon the assignments of error in this case, we will first consider those which involve points of pleading and practice ; and then, those that affect the merits of the controversy between the parties.

The three first assignments relate to the proceedings against Mrs. Eslava, who is shown by the bill to have been *non compos mentis* when it was filed, and under the guardianship of Dumie and Mazange. The order appointing the guardians was made by the judge of the County Court of Mobile, on the day of , upon the petition of Miguel D. Eslava, who represented that his wife was *non compos mentis ;* that prudence and necessity required him to dispose of a portion

of his real estate; and that to cause it to bring a fair price in the market, it would be necessary to disencumber it of the dower of his wife; and as she was *non compos mentis*, and could not relinquish it, he prayed that guardians might be appointed with full power to do so. On this petition, a general order appointing Dumie and Mazange guardians was made by that court.

This appointment was made upon no other assurance of the fact of Mrs. Eslava's lunacy than the petition of her husband, without notice to her, and without the issue of a writ *de lunatico inquirendo*, and the verdict of a jury thereon. Without the issue of this writ, and the finding of a jury, the County Court judge had no power to declare her a lunatic, or to appoint a guardian for her. These proceedings are indispensable to give the County Court jurisdiction to make the appointment; and as they were not had, and that court is one of limited jurisdiction, the proceedings on the appointment of guardians are *coram non judice* and void. Such being the case, they may be impeached in any court, in a collateral proceeding, in which a party seeks a benefit under them. Weightman v. Karsner, 20 Ala. 446; 10 Peters 449; 13 ib. 511; 6 Wheat. 119; 3 How. U. S. R. 762; 5 Hill N. Y. 568; 11 Wend. 652; 8 S. & M. 521; 16 Vermont 251.

There is no order of the County Court of Mobile, declaring Mrs. Eslava a lunatic, or person *non compos mentis*. The nearest approach to it is found in the recitals of the order appointing the guardians, and these are wholly insufficient for that purpose. Neither does the record show that she had any notice whatever of the proceedings. They were *ex parte*, and are consequently null and void. McCurry v. Hooper, 12 Ala. 823; 5 Pick. 219; 14 Mass. 222.

In the case of McCurry v. Hooper, *supra*, it was well observed by the judge delivering the opinion of the court: "I think it is a fundamental principle of justice, essential to the right of every man, that he should have notice of any judicial proceeding which is about to be had, for the purpose of divesting him of his property, or the control of it, that he may appear and show to them who sit in judgment on his rights, that he has not lost them by the commission of a crime; and that they should not be taken away from him by reason

of a supposed misfortune. That he has the right to appear before the jury and the court, to show that he is not insane, and that he and his property should not be put in charge of another, is a self-evident truth, and is denied by no legal authority." If this were not so, oppression the most unholy might be visited upon the unsuspecting victims of the cupidity or malice of others, under the forms of law; and the writ of inquisition authorized by the statute would become indeed inquisitorial in the most offensive sense of that word.

The statute conferring power on that court over this subject is in these words: "It shall be lawful for every Orphans' Court within this State, where any idiots or lunatics shall be within the jurisdiction thereof, to appoint them, or either of them, a guardian, taking bonds with approved security, for the faithful administration of the trust reposed in such guardian, in the same manner as bonds are taken from the guardians of orphans; and such guardian, when so appointed, shall continue during the pleasure of the court, and shall have the same power, to all intents and purposes, and shall be subject to the same rules, orders and restrictions, as guardians of orphans are: such lunacy being ascertained by the inquisition of a jury, by virtue of the writ to be issued by the court to the sheriff of the county for that purpose."

"Inquisitions as to idiots, lunatics, and persons *non compotes mentis*, may be ordered in vacation, or in open court, and made returnable as process of citation. On sufficient cause shown, the judge may order such inquisition to be had before him: in other respects, the same proceedings shall be had thereon as heretofore." Clay's Dig. 302, §§ 29–30. The last section refers to proceedings under the act of 1806, which required a jury of twelve men from the vicinage of the supposed lunatic to be impanneled by the sheriff, a majority of whom might render a verdict without the presence or sanction of the County Court; and which did not authorize such judge to order the inquisition to be had before himself. It does not dispense with the jury, but authorizes the judge, for good cause shown, to have the writ returnable before himself, and the jury to make the inquisition under his supervision and direction.

As the fact of the insanity of Mrs. Eslava had not been ascertained by the Orphans' Court of Mobile, and as it was

suggested alike in the bill of complainant and the answer of Miguel D. Eslava, the Chancellor should have allowed no further proceedings in the case as to her, which could by possibility affect her rights or interest, until he had inquired into the fact of her lunacy. This he had ample power to do, without directing an issue at law for that purpose. Alexander v. Alexander, 5 Ala. 517. If, on such investigation, she should be found *non compos mentis*, he should have appointed a committee or a guardian *ad litem* to watch over her interest and defend her rights.

Again, her right of dower, if any she had, in the premises conveyed by the first mortgage to Lepretre, formed an incumbrance on the fee which that deed purported to convey, and would tend to becloud the title, and consequently might well cause the lands to sell for less than their true value. To prevent this result, Eslava, as mortgagor, and the holders of the mortgage made after those to the complainant, as well as Mazange, the purchaser of the equity of redemption under all the mortgages, are deeply interested; and notwithstanding Mrs. Eslava is allowed a day by the statute to come in and review the decree, after her coverture and disability arising from lunacy have ceased, yet the decree of the court against her right to dower would give confidence to purchasers, and go far to cause the mortgaged premises to sell for their full value. To enable the court to pass on her right, she might properly be made a party, especially on the suggestion of Eslava in his answer; or by the complainant himself, who is interested in making the mortgaged lands bring the amount of his debt. It is evident, from the record in this case, that the Chancellor regarded and treated her as a party to the case in the court below, even in his final decree, and this renders it important to consider whether she was really such under the rules of practice which govern that court; and if she has not been rightly brought in, has the irregularity been waived by her, or by the defendants who have an interest in her becoming a party. That the latter is not the case, admits of no doubt.

It results from what has been said, that Dumie and Mazange, though parties to the original and amended bills of the complainant, were not the legal representatives of the rights and interest of Mrs. Eslava; and as neither bill is so framed as to

make her individually a party, the Chancellor erred in proceeding to a final decree until she was properly brought in. That she was a proper party is abundantly shown by both the original and amended bills, as by each it is sought to subject her dower interest, in the lands mentioned in the two deeds of mortgage, to the payment of the debts secured by them. To the first deed she appears as joint mortgagor with her husband, which is so acknowledged as to pass her dower estate in the land; and to the second, Dumie and Mazange assume to act as guardians, and to pass her interest in the premises by joining with Miguel D. Eslava in its execution.

In neither bill is there any prayer for process against her; but process is prayed for, issued, and executed on Dumie and Mazange as her guardians, and on the original bill a decree *pro confesso* was taken against them in that character.

It is contended, however, that she is not entitled to dower in the lands mentioned in the first mortgage, and consequently was not a necessary party to a bill filed to foreclose it. To this it may be replied, that she was joint mortgagor with her husband, and is charged to be a joint debtor with him, and the complainant, having received a mortgage from her to secure this debt, is not in a situation to excuse his neglect in failing to proceed regularly against her, by setting up her want of interest in the subject of the mortgage; being a party to that deed, she has an unquestionable right to litigate with him the question of her title to the lands conveyed by it. But it is sufficient to say, that complainant considered and treated her as his debtor, and as a party to both mortgages in his original bill, and should have brought her rightly into court, before he could be allowed to proceed further against her.

Nor is this error cured by the subsequent appointment of a guardian *ad litem* to defend for her. As she was not in court, either on the original or amended bill, by service of process under any rule known to our chancery practice, the appointment of such guardian was irregular, and the answer filed by him could not bring her before the court. If she were in truth *non compos mentis*, as both bills allege, she could not waive the irregularity herself, and the Chancellor, who is esteemed the jealous guardian of the rights of such suitors in

his court as are deemed incapable in law to protect their own interests, should not have allowed another to do so for her.

The decree *pro confesso* against Don Gregorio Funes y Munos was regularly taken on notice to him by publication; but as he had not filed an answer, nor in any other manner submitted to the jurisdiction of the court, and as he had received a mortgage on the same lands from Eslava, it was error to render a final decree against him, without requiring the complainant to make the bond provided for by our statute in cases of non-resident defendants who have not submitted to the jurisdiction of the court. Rowland v. Day, 17 Ala. 681; Erwin, Adm'r, v. Ferguson et al. 5 Ala. 158; Clay's Dig. 353 § 45.

The fifth, sixth, fourteenth, fifteenth, nineteenth, twentieth, twenty-first, twenty-second and twenty-fifth assignments of error are not well taken, as the proceedings to which they relate are regular in the court below. The twenty-eighth and twenty-ninth assignments are too general in their character; all assignments of error should point to a particular part of the proceedings of the court below in which the error complained of is thought to exist.

The eighth, ninth and sixteenth assignments may be considered together. We have already seen, that so far as the final decree affects the rights and interest of Mrs Eslava in the mortgage premises, it is irregular, and that it cannot be sustained against Don Gregorio Funes y Munos, as it is absolute in its terms, and he is a non-resident defendant who has not submitted to the jurisdiction of the court. But so far as the parties are concerned who were actually before the court at the time of the rendition of the decree, in form it is free from error. It was held by this court in the case of Tickner v. Leavin's Ex'r, 2 Ala. 149, that in a case where the defendants are adults, it is not error to decree a sale of the mortgaged premises without ascertaining, by a report of the master, whether the amount due might not have been raised by a sale of a part of the mortgage premises, unless it be suggested that such reference is proper. If the adult defendants stand by, without suggesting that the value of the mortgaged estate exceeds greatly the amount of the debt secured by the mortgage, and that the premises are capable of sub-division, and moving for a refer-

ence to the master to ascertain the facts, and report upon the subject, the Chancellor may well go on and decree a sale of the whole; and this, notwithstanding there are two mortgages, as they are between the same parties, for the same debt, and differ only as to the premises conveyed.

A different rule would prevail, if any of the defendants were infants, persons *non compotes mentis*, or, indeed, laboring under any legal disability to appear themselves, and contest the matter with the complainant. In all such cases, the Chancellor will extend to them every protection of which an adult could avail himself by the rules which regulate proceedings in courts of equity. Mills v. Dennis, 3 Johns. Ch. R. 367. If he failed to do so, it would be error.

It may be, also, that, where there are two mortgages, in favor of different mortgagees, on a part of the mortgaged premises, and one only of the mortgages extends to the other portion, he would compel the latter mortgagee to exhaust the estate which was exclusively devoted to the payment of his debt, before he would foreclose, in favor of such mortgagee, as to the premises contained in both mortgages. So, also, if the mortgagor had sold and conveyed his equity of redemption in one parcel, and retained it in the other, the Chancellor would first foreclose and sell that portion in which the mortgagor retained the equity, before he would sell the other. For it is well settled, that, where one creditor has two securities for his debt, and another but one, and that is common to them both, the former will be compelled first to exhaust the security which is exclusively his own, before he will be allowed to proceed against the one which is common to each. This question, however, does not arise in this case, as the mortgage to Don Gregorio Funes y Munos covers the entire premises described in both the mortgages to the complainant; and Mazange is the purchaser of the equity of redemption in the whole estate mortgaged. Had the parties been regularly before the court when the final decree was made, no just exception could be taken to that portion of it which directs a sale of the lands if the mortgage debt was not paid by the 30th of April. It is discretionary with the Chancellor to allow time for the payment of the sum reported by the master to be due. He may, if he will, decree a

foreclosure and sale absolutely, without giving day to the mortgagor, and such decree will be free from error. Mussina v. Bartlett, 8 Por. 277.

The sixth, seventh, tenth and eleventh assignments of error may be considered together, as they each have relation to the orders of reference made at different times by the Chancellor. The objection to the decree and order of reference made at the December term, 1850, is well taken, because Deas, who was made a party to the amended bill, was not before the court by service of subpœna, or by service perfected in any other manner whatever,, at the time that decree and order were made. He is represented in the bill as a resident of the State, and the subpœna issued against him is returned not found. It is irregular, in a chancery proceeding, to take any order generally affecting the merits of the case, until it is at issue as to all the parties. This is not excused by the supposition that the party not before the court is not a necessary one; it is enough that he is represented by the bill as having some interest in the subject matter of the suit, and is regularly made a party by proper allegations, and prayer for subpœna to bring him in. The same irregularity extends to the order of reference made subsequently at the hearing.

It is unnecessary to examine the other errors assigned in relation to the points of practice and pleading, as, in almost every instance in which they can avail the plaintiffs in error, they derive their availability from their connection with the irregularities already examined.

As the case must be sent back to the Chancery Court for further proceedings, it may not be amiss to examine the ruling of the Chancellor on the merits.

We fully agree with him, that Mrs. Eslava is not entitled to dower in the lands mentioned in the first mortgage to Lepretre. It appears that these lots were sold by him to M. D. Eslava, and a deed made to the latter on the same day on which the mortgage was executed; the two deeds were, therefore, contemporaneous acts. "To entitle the wife to dower of lands owned by her husband during coverture, he must not only be seized, but the land must vest in him beneficially for his own use. He must not be the mere conduit for passing the title to another. Nor is the seizin sufficient, when

the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase money in whole or in part. Dower cannot be claimed against rights under the mortgage. The husband is not deemed sufficiently or beneficially seized, by such an instantaneous passage of the fee in and out of him, as to entitle his wife to dower against the mortgagee. A widow in this case, on foreclosure of the mortgage, and sale of the mortgage premises, will be entitled to her claim to the extent of her dower in the surplus proceeds after satisfying the mortgage; and if the heir or the owner of the equity of redemption redeems, or she brings her writ of dower, she is let in for her dower, on contributing her proportion of the mortgage debt." 4 Kent's Com. 38; 4 Mass. 566; Clarke v. Monroe, 14 ib. 351; Bogie v. Rutledge, 1 Bay 312; Stow v. Tifft, 15 Johns. 458; McCauley v. Grimes, 2 Gill & Johns. 318; Eilliam v. Moore, 4 Leigh 30.

As to the land, however, conveyed by the second mortgage to Lepretre, it is clear that her right to dower, if she survive her husband, is good, and can be in no wise impaired by the act of Dumie and Mazange, who became parties to that deed in the pretended capacity of her guardians, and as such undertook to pass her claim of dower to the mortgagee. We have seen that their appointment is absolutely void; and were it otherwise, I apprehend, the guardians of a lunatic wife can have no authority to relinquish her dower in the real estate of her husband. The statute which authorizes the appointment of such guardians provides, that they "shall have the same powers, to all intents and purposes, and shall be subject to the same rules, orders and restrictions as guardians of orphans." Clay's Dig. 302, § 29. An ordinary guardian has no authority of his own mere will to sell the real estate of his ward; he could not thus pass the title, and such a sale would be a nullity. "With regard to the real estate it may be observed, that the guardian has no further concern with, or control over it, than what relates to the leasing of it, receiving the rents and profits, and keeping it in order. He may lease it, but the lease must not extend beyond the time when the ward will be of full age." 1 Bouvier's Inst. 143, 144; Ross v. Gill, 4 Call, 250; Truss v. Olds, 6 Rand. 256;

Jones v. Ward, 10 Yerg. 160; Genett v. Tallmadge, 1 John. Ch. Rep. 561; Shook v. Sutton, 5 Halst. 133. Again, the requirements of the statute in relation to the mode by which the wife is to relinquish her dower in the real estate of her husband, conveyed by him during coverture, effectually forbid the idea that such relinquishment can be made by any person except herself. It is required that she should be examined privately and apart from her husband, and that, on such examination, she shall acknowledge that she makes the relinquishment "as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband." Neither a guardian, nor an agent, can comply with the requisitions of this act; and consequently it may be safely held, that none but the wife, in person, can relinquish her claim to dower in the lands of her husband, aliened during coverture.

The next question presented arises out of the settlement between Lepretre and Eslava, in 1845, out of which sprung the second mortgage and the note, the payment of which is secured by it. It is for the sum of $\$23{,}402\frac{29}{100}$, and it is insisted by Eslava that, in making up this sum, compound interest was charged and allowed. The governing principle acted upon in matters of mortgage by the courts of equity is, that the mortgagee shall be entitled only to principal, interest, and costs; and it protects the debtor with peculiar jealousy against any attempt on the part of the mortgagee, by taking advantage of the necessities of the mortgagor, to impose on him harsher terms. Acting on this principle, equity has held, that an agreement entered into at the time of the loan, for converting interest into principal, from time to time as it shall become due, is oppressive and unjust, and tending to usury, and consequently it cannot be supported. But when interest has once accrued due, it becomes a debt. There is no longer, therefore, any objection to an agreement *inter partes*, that it shall be considered principal, and thenceforth carry interest. Indeed, it would be injurious to the mortgagor to establish the contrary, as it would remove an inducement to the mortgagee's permitting his principal to remain, and, consequently, equity has recognized such agreement; but there must be no extortion on the part of the mortgagee, or otherwise equity will interpose for the relief of the mort-

gagor. Brown v. Barkham, 1 Pr. Wms. 654; Thornhill v. Evans, 2 Atk. 330; Coote on Mort. 431, marg.

Equity considers the arrears of interest so converted into principal by agreement between the parties, in the light of a further advance, and when, as in this instance, there was no other charge or incumbrance on the estate of which the mortgagee had notice, at the time of such agreement and settlement, it will be allowed to be tacked to the first mortgage, and there can be no objection to its forming a part of the consideration for the second. 3 Pow. on Mort. 911 (Rand's edition); Pawling v. Pawling, 4 Yeates, 220; Barclay v. Kennedy, 2 Wash. C. C. Rep. 350; Digby v. Craggs, Amb. 612; Greenleaf v. Kellogg, 2 Mass. 568; Coote on Mort. 431, marg.

It is also well settled, that, in case interest runs in arrear, and in the mortgagee's account of arrears rests are made from time to time, on which interest is calculated, and ultimately a general account of all arrears, calculated on the footing of those rests, is signed by the mortgagor, and confirmed by a deed, although executed after a lapse of several years, for securing the balance, the transactions are not usurious, and the mortgagor is liable. Blackburn v. Warwick and wife, 2 Younge & Col. 92. In the present case, the settlement on the basis of rests in the account, and interest compounded on such rests, formed the basis on which the note for $\$23,402\frac{2}{100}$ and the mortgage of 1845 were executed by Eslava, and as he has thus sanctioned it, and there was no conflicting lien or subsequent incumbrance on the property at the time of this settlement, he will not be allowed to complain of it, and the court will charge the mortgaged premises with the payment of the sum so found due.

The agreement, however, of the 4th February, 1845, by which Eslava agrees that Lepretre shall be allowed to compound the interest on the mortgage debt, annually, for the term of four years, at the rate of 8 per cent., does not deserve the favor of a court of equity, and will not be enforced. It has been before remarked, that a court of equity regards with jealousy all arrangements made between the mortgagor and mortgagee, by which the latter obtains an advantage over the former not stipulated for in the mortgage deed itself. And while it will permit the mortgagee to state his account

for interest past due, allowing rests, and compounding the interest at each rest, if they are not too frequent, considering the interest accrued already as a further advance; yet, acting on the principle that the parties do not deal on terms of strict equality, equity has held, that an agreement entered into at the time of the loan, for converting interest into principal from time to time as it shall become due, is oppressive and unjust, and tending to usury, and that, consequently, it cannot be supported. Mitford v. Featherstonhaugh, 2 Vesey, 445; Ossulston v. Yarmouth, Salk. Rep. 449; Chambers v. Goldwin, 9 Ves. 271; Coote on Mort. 433, 434. The agreement under consideration comes under the rule laid down in these and numerous other cases, and the complainant cannot be allowed to set it up and enforce it against Eslava.

We regard the other agreement of the same date, by which Eslava, in consideration of his inability to pay the debt to Lepretre, and as an indemnity to the latter for the difference between the amount of interest allowed by the laws of this State on the debt of Eslava to him, and that which Lepretre was paying on money borrowed in Louisiana, binds himself to pay the additional interest of 2 per cent. per annum, over and above the 8 per cent. allowed by law, as rightly set aside by the Chancellor. It is both oppressive and unjust, and deserves no favor at the hands of a court of equity.

We agree, also, in the conclusion of the Chancellor, that, on a reference to the master, the amount of the debt secured by the second mortgage should be taken as the basis of the account, and as the true sum due from Eslava to Lepretre at that date, which is properly chargeable on the mortgage premises. We perceive, however, that in setting down the amount of this note in his directions to the master, the Chancellor has stated it to be $23,502 29, instead of $23,402 29, as it is shown to be in the record and mortgage. He was doubtless betrayed into this error by the fact, that the former is abundantly proved to be the amount which was really due to Lepretre at the time the note was executed, but, through mistake, both the note and mortgage are for one hundred dollars less. The sum thus omitted through mistake cannot be considered as a part of the mortgage debt, to charge its payment upon the lands conveyed, especially as the rights of

a subsequent mortgagee, and a purchaser of the equity of redemption have intervened before the mistake was discovered and corrected.

We think, also, that on the accounting Eslava should be allowed a credit for all sums paid by him in good faith for filling up, walling, &c., the lot of Lepretre, mentioned in the pleadings and proof, less whatever amounts may have been received by him, and are unaccounted for, of rents and profits arising out of said lot. The proof is ample, that he had Lepretre's authority to make the expenditure, and the latter should not now be allowed to repudiate it.

It remains only to be said, that, for the errors hereinbefore noted, the decree must be reversed, and the cause remanded.

It may not be amiss to add, that, on the cross error assigned by Lepretre, no reversal could take place, as his only complaint is, that the amount of money which the decree ascertains to be due to him on the mortgage was too small, when it is evident, from our ruling on the errors assigned by the defendants, it is greater than it will be found to be when the error of $100 is corrected, and Eslava is allowed a credit for the money expended in filling up the lot mentioned in the pleadings and proof.

CHILTON. J.—I concur in the reversal of this cause; but as to that portion of the opinion delivered by my brother Ligon which asserts the necessity of making Mrs. Eslava a party, under the facts disclosed in this record, I am constrained to differ.

It is clear, from the whole case made by the pleadings and proof, that the only interest Mrs. Eslava had in the litigation was, as the wife of the mortgagor, signing the mortgage with her husband, by way of relinquishing her dower.

In my opinion, the Chancellor could not, by any decree that could have been rendered, affect the wife's right to dower, should it ever be consummated by the death of her husband. The law prescribes the manner in which she may relinquish her right, and the Chancery Court has no power, upon her defective voluntary relinquishment, to aid it in any way. If her supposed right to dower constituted a cloud on the title, and the Chancellor could not, by his decree, remove

it, there was no necessity for her being brought in merely that the Chancellor might express an opinion as to whether her right of dower attached to the mortgaged premises or not. The court will not do a useless thing; and it would but delude purchasers, instead of removing a cloud from the title, should the Chancellor be of opinion the wife had no dower, when in fact she had such inchoate right; for they would naturally repose upon the opinion as binding the parties, when it would have no such effect. A party may go into chancery, in many cases, to disencumber estates, so as to prevent sacrifices upon their sales by reason of some alleged incumbrance or opposing title. But this jurisdiction only obtains where the court has the power to remove the cloud which casts a shadow over the estate of the complainant.

I apprehend the court, in the absence of all power to decree in reference to the alleged incumbrance, will never take jurisdiction merely for the purpose of giving an opinion which cannot be binding upon the parties. The court, in this case, so far as Mrs. Eslava was concerned, could have done nothing more; and hence I conclude that there was no necessity whatever for Mrs. Eslava being brought before the court, and that the Chancellor did not err in proceeding in her absence.

STEELE *vs.* ADAMS.

1. Where one knowingly suffers another, in his presence, to purchase property to which he has a claim or title, which he wilfully conceals, he will be deemed to have waived his claim, and will not afterwards be permitted to assert it against the purchaser or his privies; but if the person having the claim or title, and being so present, is not apprized of his rights, or if, from any other cause, the duty of asserting them does not devolve upon him to protect the purchaser from injury, the reason of the rule ceases, as there is no violation of duty, and the rule itself does not apply.
2. The *onus probandi* in such case lies upon the purchaser, to show that the party's silence was wilful; but this requires no positive proof, and may be inferred by the jury whenever the surrounding circumstances are such as to warrant the belief that his silence was incompatible with innocence of inten-

tion or object; and if such was the case, it is immaterial whether or not the act of the purchaser was influenced by it.

3. But where the purchaser is already apprized of the existence and character of the claim, notice and the assertion of it would be a useless and unnecessary act, so far as he is concerned.
4. A compliance with the statutes of registration in relation to mortgages is equivalent to actual notice, so far as to charge a subsequent purchaser from the mortgagor.
5. The retention of the possession of mortgaged property, by the mortgagor, after the law day has passed, is not *prima facie* evidence of fraud, nor a circumstance to which the law attaches the presumption of payment; nor is the purchaser authorized to infer payment of the mortgage debt, from the retention of possession by the mortgagor after the law day has passed, unless under such circumstances as would satisfy a jury of that fact.
6. Where the mortgaged property is sold, after the law day of the mortgage has passed, under execution against the mortgagor, which came to the hands of the sheriff after the mortgage was recorded, at which sale the mortgagee is present, and does not disclose his claim, and the property is purchased by one who was not apprized of the mortgagee's presence at the sale, the registration of the mortgage operates as actual notice to the purchaser and his privies.

ERROR to the Circuit Court of Lowndes.

Tried before the Hon. E. PICKENS.

DETINUE by Steele against Adams, for the recovery of a slave which the plaintiff claimed under a mortgage executed to him by one Borland, and which the defendant claimed through a purchaser at sheriff's sale under execution against Borland.

The evidence showed, that the mortgage was executed and duly recorded before the executions under which the slave was sold came to the sheriff's hands, and that the sale took place after the law day of the mortgage had passed; that the plaintiff was present at the sale, and did not disclose his claim on that occasion; that said slave was purchased at the sale by a person who did not know that the plaintiff was present at the sale.

Upon this evidence, the court charged the jury: that, if the plaintiff was present, and knew of the sale of the slave in controversy, and did not notify the by-standers of his claim, or forbid the sale, then he could not recover in this suit, notwithstanding the mortgage was duly recorded; to which charge the plaintiff excepted.

The plaintiff requested the court to give the following charges:

"1. That if his mortgage was duly recorded, then that registration operated as notice to the world, and although plaintiff may have been present, and knew of the sale, he was not bound to forbid it, or to give further notice of his claim;

2. That plaintiff's claim being based on Borland's mortgage to him, and that mortgage having been duly proved and recorded in the proper county within twelve days after its execution, if the jury find, that said mortgaged property was in the county of Lowndes at the time the mortgage was made, and continued there until the levy and sale; and if the jury further find, that said mortgage was made in good faith, to secure a *bona fide*, subsisting debt, and the said mortgage debt is unpaid, then plaintiff's right to recover is not impaired by his presence and silence at the time of the sale, unless the testimony convince the jury that he thereby intended to, and did deceive and defraud the purchasers;"

3. That if the purchaser at said sale did not know that plaintiff was present at the sale, and consequently was not influenced to buy by the fact that plaintiff did not forbid the sale or object to it, then the jury must find for the plaintiff, notwithstanding he may have been present at the sale and did not forbid it.

Each one of these charges was refused, and the plaintiff excepted to each refusal; and he now assigns for error the charge given and the several refusals to charge as requested.

WATTS, JUDGE & JACKSON, for plaintiff in error:

Steele was not bound to notify the by-standers of his claim, nor to forbid the sale; his mortgage having been registered, the purchaser of the slave at the sheriff's sale is charged with notice. If he had forbidden the sale, he could not have stopped it, and he was not required to repeat the notice which the record gave. The presumption of notice arising from registration, is not such a presumption as can be rebutted by proof; it is a conclusive presumption. "Mere silence on the part of Steele at the sale, is not sufficient to affect his rights; there must be actual fraud charged and proved, such as false

representations, or denial upon inquiry, or artful assurance of good title, or deceptive silence when information is asked; and the burden of the charge and proof of fraud, lies on the purchaser." Brinkerhoof v. Lansing, 4 Johns. Ch. R., 66.

Steele cannot be estopped from asserting his title now, for estoppels are not favored; and the facts in this case do not constitute an estoppel *in pais*. To constitute such an estoppel, "three ingredients are necessary; first, misrepresentation, or wilful silence, by one having knowledge of the fact; second, that the actor, having no means of information, was induced, by the conduct of the other, to do what otherwise he would not have done; and thirdly, that injury would ensue from a permission to allege the truth." Commonwealth v. Moltz, 10 Barr's R., 527; U. S. Ann. Digest, 1849, 200, § 27. These requisites do not exist in the present case; for the purchaser did not even know that Steele was present at the sale, and of course could not have been influenced by his conduct. See also, Kinney v. Farnsworth, 17 Conn., 355; Brown v. Wheeler, ib. 345; Woodman v. Bodfish, 25 Maine R. 317.

ELMORE & YANCEY, for defendants in error:

1. A sale or pledge of a note, or of property, by one having no title, in the presence of the owner, without objection or notice given by the owner of his claim, when it is *sui juris*, estops him from impeaching the transaction on the ground of his title. Bird v. Benton, 2 Dev., 179; Governor v. Freeman, 4 Dev., 472; Watson v. McLaren, 19 Wend., 557; 21 Wend., 172; Thompson v. Sanborn, 11 New Hamp., 201; Tyler v. Yates, 3 Barbour, 222; Davis v. Tingle, 8 B. Monroe, 539; Storrs v. Barker, 6 Johns. Ch., 166; Wendell v. Vanrenssalaer, 1 Johns. Ch., 354; Brig Sarah Ann, 2 Sumner, 211; 6 Ad. & Ellis, 474.

2. That the claimant is a mortgagee with his deed recorded makes no difference, if the law day has passed when the sale is made. Up to that time the possession of the mortgagor is consistent with the interest and title of the mortgagee, and the contract and the record gives notice of his interest. But when the law day has passed, the possession of the mortgagor is inconsistent with any other fact than the payment of the

debt; and this accords with the presumption of law that the debt was paid at maturity, and the record is no notice to third parties, after the law day has passed and the property remains with the mortgagor, that the debt and mortgage are still subsisting and valid, and will not dispense with the necessity of the mortgagee's speaking out when he sees the property about to be sold. If the absolute owner of lands in possession, and with his deed recorded, stands by and permits a stranger, with his knowledge, to sell to another these lands, he is bound by it; and yet there is both constructive and actual notice in the eye of the law to the purchaser of where the title is; and there is no reason for placing the mortgagee, who by the terms of the deed has become the absolute owner, but from negligence omits to take possession, on a better footing than the original, absolute owner.

If Steele had stood by and seen his own negroes sold without objection, he could not afterwards object to the sale on the ground of his title; and no more can he in this instance. The declaration of the sheriff that he is about to sell the negroes as Borland's, is an affirmation that they are Borland's, and Steele by his silence admits the fact. That the purchaser did not know Steele was there makes no difference; he knew that no objection was made by any one of the bystanders, and presumed that there was no claim from this fact, and on that presumption bought. If Steele had declared his right to the negroes would the purchaser have bought? The purchaser acted on the silence of Steele and of every one present, and being so influenced it is an estoppel against Steele.

Steele's silence was deceptive; it did deceive, and it was intended to deceive. He had an interest in the property bringing a high price, because these were executions on which he was bound, and on which he had no security; and when we find a motive for the silence, and that silence inconsistent with any other purpose than this motive, we are compelled to refer the silence to the motive, and determine that the one was caused by the other. This then was a fraudulent silence.

It is contended that a purchaser at sheriff's sale buys nothing but the defendant's interest, while at the same time the

counsel are compelled to admit, that if Steele was guilty of deceptive silence or language the whole interest would pass, Steele being concluded. The admission is an answer to the proposition. If the proposition were true, the purchaser would acquire no title or interest where the absolute owner stood by and saw his property sold, because the defendant in that instance has no interest.

In such cases, the law presumes the sale to be with the assent of the party having the title or claim, and to permit him afterwards to impeach it would be a fraud on the purchaser; good faith when practicable is required.

When A deals with B, who is the agent of C, in relation to property belonging to C, and the subject of the agency, but is ignorant of the agency, and deals with B as the owner of the property, C cannot afterwards disclaim the authority of B, on the ground that A dealt with B as the owner; when A discovers there was a principal, he can hold him responsible. So if the claimant of the property accepts part of the purchase money arising from a sheriff's sale, he is estopped from disputing its validity. In these cases, the knowledge of the other party, or the purchaser, has no influence, and the validity of the sales rests, not upon his knowledge, but on the affirmation by the claimant of the sale from his silence.

GOLDTHWAITE, J.—The principal question presented by the record is, as to the effect of the presence of the plaintiff in error at the time the slave sued for was sold under execution, and his failure on that occasion, under the circumstances by which he was surrounded, to disclose his claim. We understand the general rule to be well settled, that where one knowingly suffers another, in his presence, to purchase property to which he has a claim or title, which he wilfully conceals, he will be deemed, under such circumstances, to have waived his claim, and will not afterwards be permitted to assert it against the purchaser or his privies, Watson v. McLaren, 19 Wend. 557; Bird v. Benton, 2 Dev. Law R. 179; Storrs v. Parker, 6 Johns. Ch. R. 166; Wendell v. Vanrenssalaer, 1 Johns. Ch. R. 354; and this principle may be asserted in relation to personal property, in a court of law. Hare v. Rogers, 9 B. & Cress. 586. The reason of

the rule is founded on the moral duty which devolves upon the person having the claim, if present, to make it known to the purchaser; and failing to assert it at a time when common honesty required him to do so, the law will not allow him afterwards to insist upon it, against him whose purchase may be attributed to his culpable silence. But if the party so present is not apprised of his rights, or if, from any other cause, the duty does not devolve upon him of asserting them, to protect the purchaser from injury, it is evident, that, in such cases, as there is no violation of duty, the reason of the rule ceases, and the rule itself does not apply.

It is, however, urged by the counsel for the plaintiff in error, that *mere* silence is not sufficient to authorize the application of the rule: that it must be a *deceptive* silence, and that the proof that it is so lies upon the purchaser. It is unquestionably true, that it devolves upon the purchaser to establish the fact upon which the validity of his own title depends, and, under the rule which we have laid down, the silence of a person, to amount to the waiver of a claim on his part, must be wilful; and it necessarily follows, that the character of the silence which is essential to invalidate the claim set up, and thus render his own title good, must be established by the purchaser. But this character requires no positive proof, and may be inferred by the jury, whenever the surrounding circumstances are such, as to warrant the belief that the silence of the party having the title or claim to the property, was incompatible with innocence of intention or object; and if such was the case, we regard it as immaterial whether it did or did not influence the act of the purchaser. The law is not founded on the supposition, that the purchase was made for the reason that the party having the claim was silent, but because such party is supposed to have waived his claim, by the failure to assert it.

The record discloses the fact, that the claim of the plaintiff in error to the slave sued for was founded on a mortgage, executed to him by Abram Borland, which had been duly recorded in the proper county, and the law day of which had expired before the sale of the property under execution; and the question is presented, as to the application of the rule upon this state of facts. As the object of the notice is, to

prevent injury to the purchaser, it is clear, that the reason of the rule ceases, and its application could not properly be made to those cases, where the purchaser was apprised of the existence and character of the claim. Notice and the assertion of the claim, so far as he was concerned, would be a useless and unnecessary act; and the whole question in this aspect, is, as to the effect of the registration of the mortgage of Borland to the plaintiff in error, as notice. The whole object of the statutes of registration in relation to mortgages, is, to furnish to all notice of claims of this character, by requiring the instrument creating the lien to be recorded in a designated public office, which is accessible to all; and the uniform course of decision of all courts has been, to consider a compliance with these acts as equivalent to actual notice, so far as to charge a subsequent purchaser. It was upon this ground that Chancellor Kent, in the case of Brinkerhoof v. Lansing, 4 Johns. Ch. R. 66, held, that it was not incumbent on the witness to a lease, with knowledge of its contents, and holding a registered mortgage on a portion of the premises, to disclose his incumbrance to the lessee; and that, in such case, as the latter was chargeable with notice by the registration of the mortgage, it would require direct proof of intentional fraud and deception, to postpone the mortgagee to a subsequent purchaser. We think, therefore, that the registration of the mortgage of the plaintiff in error operated, as to the subsequent purchaser and his privies, precisely the same as if they had actual notice of its existence; and the fact that the law day had passed before the purchase was made, does not, in our opinion, place the purchaser in any better position, as the retention of mortgaged property by the mortgagor after the law day, is not, as in the case of an absolute sale, *prima facie* evidence of fraud, (Simerson v. Branch Bank at Decatur, 12 Ala. 205,) nor a circumstance to which the law attaches the conclusion of payment. Planters' and Merchants' Bank v. Willis & Co., 5 Ala. 771. It is true, as was decided in the case last referred to, that the retention of the possession after the law day, for an unreasonable length of time, by the mortgagor, is a circumstance from which the jury might infer the payment of the mortgage debt; but as the law does not attach this inference to such possession as a

legal presumption, the purchaser would not be authorized to infer payment, unless under such circumstances as would satisfy the jury of that fact.

The view which we have taken of the law, in relation to the effect of registration as notice to the purchaser, will probably be decisive of the case on a future trial, and renders it unnecessary for us to express an opinion on the other points presented in the argument.

The charge given by the court below, and the refusal to give the first and second charges asked, being in conflict with the view which we entertain of the law, the judgment must be reversed, and the cause remanded.

LINDSAY *vs.* HOKE & ABERNATHY ET AL.

1. When several plaintiffs join in an action of trespass to try titles, a deed conveying the land in controversy to some of them is admissible evidence for the grantees therein named; and therefore a motion to exclude it entirely may be refused.
2. *It seems*, that when land is conveyed by deed to a firm by their firm name, the deed may be aided by parol proof showing the names of the particular individuals of which the partnership was composed.

ERROR to the Circuit Court of Benton.

Tried before the Hon. THOMAS A. WALKER.

WHITE & PARSONS and RICE & MORGAN, for plaintiff in error:

1. The deed to Crow & Moore is void for uncertainty. Humble v. Glover, 1 Croke, Eliz. 328; Allison v. Hampton, 11 Humphrey, 71; Revis v. Lamme & Bro., 2 Mo. 207; Hudson v. Gayle, 10 Ala. 116.

2. The title to land must be by deed or writing; hence it must all be in writing, not part writing and the rest parol! proving the christian names of these grantees, Crow & Moore, would be showing a title to land by parol evidence. This cannot be done. McPherson v. Waters, 16 Ala. 714.

If the deed be to John Smith, and there are several of that

name, parol proof may be offered to show which John Smith is intended. But this is not a violation of the statute of frauds; the statute has been complied with, by giving the full name of the grantee. Nothing more could be done by the deed; therefore, the parol proof does not create a title, in giving direction to the deed.

J. B. MARTIN, *contra.*

PHELAN, J.—This was an action of trespass to try titles, brought by Hoke and others against Lindsay.

The plaintiffs, in their declaration, describe themselves as follows: "John D. Hoke, George Hoke, Daniel Hoke, Jr., and Miles W. Abernathy, co-partners, doing business under the firm, name and style of Hoke & Abernathy, Samuel P. Hudson, Courtney J. Clarke, Alfred Moore and James Crow, Edward L. Woodward and James D. Porter, plaintiffs, by attorney complain, &c."

To establish their title to the lands in question, the plaintiffs proved and introduced a deed for the premises, made by the sheriff of Benton county, in virtue of sundry executions in his hands, which had been duly levied on the land as the land of the defendant.

The part of the deed containing the words of conveyance, and describing the grantees, is in these words, to-wit: "I have granted, bargained and sold, and by these presents do grant, &c., unto the said Samuel P. Hudson, Courtney J. Clarke, Crow & Moore, E. L. Woodward, James D. Porter, and Hoke & Abernathy, their heirs, executors, administrators and assigns, all the estate, &c., of the said John Lindsay," &c.

"The defendant objected to the reading of the deed, upon the ground that the parties named in the deed as Hoke & Abernathy were not, nor were any other parties therein named, the same persons named in the declaration as John D. Hoke, George Hoke, Daniel Hoke, and Miles W. Abernathy, partners in trade under the firm name of Hoke & Abernathy." The plaintiffs then proved that said individuals composed the said firm of Hoke & Abernathy.

"Defendant then further objected to the reading of said deed, because the persons named Crow & Moore in the deed, were

not described or named in the declaration. This objection was overruled. Defendant then proved that Crow & Moore was a partnership name of the firm of Crow & Moore, and that it was a partnership at the date of the judgment, composed of James Crow and Alfred Moore, and thereupon renewed the objection to the reading of said deed. But the court permitted the deed to be read, and defendant excepted to these rulings of the court."

The motion to exclude this deed from the jury was properly overruled, let the question as to its sufficiency in respect to the description of the grantees described in it as "Hoke & Abernathy" and "Crow & Moore," be as it may. The deed was unquestionably good as to the other grantees named in it, even if not sufficient as to these; and being competent proof beyond doubt as to the others, the motion to exclude it as a whole, was correctly refused. The bill of exceptions does not purport to set out all the proof.

Had the question been presented upon a motion to instruct the jury as to the legal sufficiency of a deed of land made to a firm in their firm name, and the right to make the identification of the grantees so named certain by parol proof, as was done in this instance, we should probably have found little difficulty in coming to the conclusion, that such a thing in a deed for land, however contrary to common and correct usage, is, nevertheless, legal in itself, and may be aided by parol proof, showing the particular individuals of which the partnership was composed. 11 Dev. 103; 19 Verm. 613; 7 Shepley, 413; 2 Brock. 156. But this question is not raised in such a manner that we are called upon to decide it.

Let the judgment be affirmed.

TRULOVE *vs.* BROWN.

1. In trover for the conversion of a promissory note, the evidence showed "that the note was traded to defendant by plaintiff for a wagon and oxen, with a reservation on the part of the plaintiff, that he should, at any time before the

note fell due, have the privilege of redeeming it, by paying the defendant fifty-five dollars." *Held:*

1. That the court could not infer that the note was endorsed absolutely to the defendant, so as to vest in him the legal title, and thereby prevent a recovery by plaintiff;
2. That the tender of the money within the specified time, and demand of the note, gave the plaintiff the immediate right of possession.

ERROR to the Circuit Court of Marion.

Tried before the Hon. TURNER REAVIS.

EARNEST, for plaintiff in error.

E. W. PECK, *contra.*

DARGAN, C. J.—This was an action of trover, brought by the plaintiff to recover of the defendant for the conversion of a note, or an instrument of writing, whereby James A. Thompson and Thompson Harris promised, on the 25th of December, 1849, to pay said plaintiff forty-five hundred pounds of seed cotton. Upon the trial, a bill of exceptions was taken, the language of which is as follows: "The plaintiff introduced two witnesses, who testified, that they were present, and heard a trade made between the parties; that the note was traded to the defendant by plaintiff for a wagon and oxen, with the reservation, on the part of the plaintiff, that he should, at any time before the note fell due, have the privilege of redeeming it, by paying the defendant fifty-five dollars." It was also shown, that the plaintiff had tendered the defendant the sum of fifty-five dollars before the note fell due, and demanded it. The plaintiff further proved, that he had deposited in court the said sum of fifty-five dollars. On this evidence the court instructed the jury, that the plaintiff could not recover.

It is insisted for the defendant in error, that we must infer that the note was endorsed to him by the plaintiff, and inasmuch as our statute allows the endorsee of such note to sue and recover in his own name, that, therefore, the plaintiff has failed to show a legal title to the note, and consequently cannot recover. We held, in the case of Lowremore v. Berry, 19 Ala. 130, that the possession of a promissory note was sufficient to authorize a recovery in trover against a wrongdoer, although the money was payable to another, unless the

defendant could connect himself in some way with the legal title of the payee. But in the case before us, if we could infer from the bill of exceptions that the note was endorsed absolutely to the defendant, without any restriction or qualification, we might hold, that the legal title being in the defendant by such endorsement, the plaintiff could not recover. But we do not feel authorized to draw this presumption or inference from the language of the bill of exceptions. It is, that "the note was traded to the defendant" for a wagon and oxen, reserving the right to redeem it, at any time before the note fell due, by paying fifty-five dollars.

This was the contract by which the note came into the possession of the defendant, and we are not advised that any part of it was reduced to writing, and, therefore, we cannot infer it, nor can we infer that the note was endorsed absolutely to the defendant.

Looking, then, to the contract as it was disclosed by the parol proof, it can amount only to one of two things: either that the note was pledged to secure the defendant in the payment of fifty-five dollars; or it was a sale of the note with the right to repurchase within a specified time, at the sum of fifty-five dollars. The transaction can amount only to the one or the other of these contracts; and we think it immaterial which of the two it may be considered, for in either case the tender of the money, and the demand of the note, gave the plaintiff the immediate right of possession. If it were a conditional sale of the note, the tender of the price agreed to be paid within the specified time, restored the plaintiff to his title, and his right of possession. Sewall v. Henry, 9 Ala. 24; Bogan v. Martin, 8 Ala. 807. And if we consider the contract as a pledge to secure the defendant in the sum of fifty-five dollars, the tender of the money at the proper time divested the defendant of his right to the possession, or to hold the note, and consequently the title and right of possession must be thereby restored to the plaintiff. In any point of view we can take of the contract, as exhibited by the proof set out in this bill of exceptions, we think the court erred in the instructions given to the jury.

In conclusion, we will observe, that no question is made as to the amount of damages which the plaintiff may be en-

titled to recover, that is, whether he can recover the full amount of the value of the note, or only the difference between the value of the note and the sum of fifty-five dollars. We, therefore, will intimate no opinion on this subject.

Let the judgment be reversed, and the cause remanded.

LINN *vs.* ROBINSON & POLLARD.

1. In allotting dower in equity to a widow, it must be computed according to the value of the land at the time of the alienation by the husband, and not according to its value at the time of the allotment.

ERROR to the Chancery Court of Montgomery.

Heard before the Hon. J. W. LESESNE.

Mrs. Ann M. Linn filed this bill against the defendants in error, alleging that they were in possession of, and claimed title to a certain lot situated in the city of Montgomery, of which her deceased husband had been seized in fee during their coverture, and which he had aliened to some person unknown to complainant; that valuable improvements had been made on said lot since said alienation, and that her dower interest therein could not be assigned by metes and bounds. The prayer of the bill is, "that lawful interest upon one third of the value of said lot, apart from said improvements thereon, be paid annually to complainant during her life, and that the payment of the same be secured by a lien upon said lot; and further, for reasonable damages for the detention of her dower."

The answers admit all the allegations of the bill, and dispense with proof, submitting to abide the decree of the court. It was admitted, that the value of the lot, at the time of the alienation by the husband, was one hundred dollars, and that its present value, exclusive of said improvements, is six hundred dollars. The Chancellor decreed, that the dower should be estimated according to the value of the land at the time of the alienation by the husband, and this is assigned for error.

WADE KEYES, for plaintiff in error.
HENRY C. SEMPLE, *contra.*

CHILTON, J.—It is true, as the learned counsel states, that in no case hitherto presented to this court has the question presented by this record been directly discussed; yet, if the view taken by him be correct, that equitable dower must be estimated according to the value of the land at the time of the allotment, excluding the improvements made by the husband's alienee, the case of Beavers & Jemison v. Smith, 11 Ala. Rep. 20, and the subsequent cases based upon that decision, were clearly erroneous; for, as very properly stated by his Honor, the Chancellor, it would certainly have been erroneous to order the master to compute the value of the dower at the time of alienation, instead of at the time of the allotment, if the latter had been the proper period.

In the first case, (Beavers et al. v. Smith,) the matter as to the value of the dower was referred to the master, and the court could not have assumed, as matter of law, that that value was the same at the time of alienation and of the assignment, which was a number of years subsequent to the husband's disposition of it. In the reference, the Chancellor cut off all inquiry as to the value at the time of taking the account, by confining the master to the period of alienation. This decree was assigned for error, and the counsel against the demandant insisted that she was dowable in the lands "according to their value at the time of allotment, excluding the improvements made by the defendants," and cited the opinion of Mr. J. Story in 3 Mason's C. C. Rep., 347, and the cases referred to by him in support of the position. But the court held the decree in this respect correct. Now, although it is said no question was raised as to the appreciation in value of the land, it is most obvious that the question was raised, whether the Chancellor had decided correctly in forestalling that inquiry, by confining the register to the time of alienation, irrespective of the question of appreciation or depreciation in the value of the land.

In Francis et al. v. Garrard, 18 Ala. R., 796, we said, that the case of Beavers & Jemison v. Smith has ever since been considered as settling the rule upon this subject, namely, that

the interest on one third the value of the land at the time of alienation by the husband, to be annually paid to the widow, and its payment made secure by a lien on the land, or in some other eligible mode. We are aware that this rule may sometimes fail to do complete justice; but the same objection applies to that contended for by the counsel for the demandant. For if, instead of an appreciation in the value of the land to the amount of $500, the price had fallen that sum, in such case, the same hardship would have been visited on the opposite party. Either rule must be to some extent arbitrary, and we prefer adhering to that which, as we conceive, has been established by our predecessors, and hitherto followed by us.

Let the decree be affirmed.

FRIERSON *vs.* FRIERSON.

1. One who has not the entire interest in the property sued for cannot maintain detinue.
2. A testator, by the first clause of his will, bequeathed sixteen negroes specifically to his wife, and, by other clauses, made absolute specific bequests to four of his daughters, giving to one eleven negroes, to another four, and to another two. The residuary clause was as follows: "It is my will and desire, that my beloved wife have the residue and remainder of my estate, both real and personal, during the term of her natural life, and that no sale or alteration of my plantation, stock, household furniture, or any other thing shall accrue, until her death; then, it is my will and desire, that *my negroes be divided between my five daughters*, share and share alike, for their use during the term of their natural life, and not subject to the debts of their husbands, or any future husbands, and at their deaths to their heirs forever; and it is further my will and desire, that the residue and remainder of my estate, both real and personal, be divided between my four daughters, viz:" &c. *Held*, That the negroes mentioned in the residuary clause were those which were specifically bequeathed to the wife by the first clause, or included such slaves only as were not specifically bequeathed; and that the residuary clause did not embrace the slaves specifically bequeathed to the daughters, so as to give them a separate estate therein.
3. At law, where the title to property has vested in the husband, as in case of a gift or bequest to the wife, no contract which he may afterwards make directly with her, and *a fortiori* no declaration or admission made by him during co-

verture, can vest the property in the wife, so as to enable her to maintain or resist an action by or against his personal representative.

4. The admission of irrelevant testimony will reverse, unless the record clearly shows that no injury could have resulted; it is not enough, that the Appellate Court is not able to discover injury; it must see clearly that none could have resulted.

ERROR to the Circuit Court of Tuskaloosa.

Tried before the Hon. GEO. D. SHORTRIDGE.

DETINUE by the plaintiff in error, Mary C. Frierson, against the executor of her deceased husband, Robert Frierson, for the recovery of four slaves, which the plaintiff claimed under the will of her father, Thomas McRae, as her separate estate.

On the trial below, the plaintiff introduced a copy of the will of said McRae, the material provisions of which are as follows: The first clause contains a specific, absolute bequest of sixteen negroes to the testator's wife; the second, a specific bequest of eleven negroes to his daughter, Sarah B. McRae, "to her and her heirs forever;" the third, a specific bequest to his daughter, Mary C. Frierson, of four negroes, "to her and her issue forever;" the fourth, a specific bequest of two negroes to his daughter, Catherine D. McDowell, "to her and her heirs forever;" the fifth, a bequest to his daughter, Sarah B. McRae, of a feather bed and furniture; then follows the residuary clause, which is as follows: "It is my will and desire, that my beloved wife have the residue and remainder of my estate, both real and personal, during the term of her natural life, and that no sale or alteration of my plantation, stock, household furniture or any other thing shall accrue, until her death; then it is my will and desire, that my negroes be divided between my five daughters, share and share alike, for their use during the term of their natural life, and not subject to the debts of their husbands or any future husbands, and, at their deaths, to their heirs forever; and it is further my will and desire, that the residue and remainder of my estate, both real and personal, be divided between my four daughters, viz: Catherine D. McDowell, Sarah B. McRae, Esther L. Witherspoon and Mary E. White, share and share alike."

The plaintiff also proved, that the four slaves sued for were those bequeathed to her by the third clause of said will; that

they were sent to this State after said testator's death, and came into the possession of her husband; that he was at first disposed to assert title to them, but afterwards admitted that he was satisfied they belonged to his wife; that he hired them from her by an agreement in writing, and paid her the hire; that one of the negroes was, at her request, delivered to her son by a former marriage, and retained by him for nearly twelve years, until the death of said Frierson, when he was delivered to the plaintiff, and was by her brought back and placed upon the plantation of said Frierson.

The defendant offered evidence tending to show, that the said Thomas McRae had other slaves than those specifically bequeathed by his will; to which evidence the plaintiff objected, on the ground that parol evidence was not admissible to explain said will; but the court overruled the objection, and admitted the evidence, and plaintiff excepted.

The court charged the jury: "That, laying aside the parol evidence objected to, the true construction of the will of Thomas McRae was, that as the gift over of slaves after the death of the wife was repugnant to the first clause of the will giving her an absolute estate in the slaves there mentioned, her estate in the slaves was cut down to a life estate, with remainder at her death to the five daughters of the testator, and that in these slaves the five daughters would take a separate estate; but that the bequest to the plaintiff, by the third clause of the will, of the four slaves in controversy, was absolute, and that the marital rights of the husband immediately attached; further, that the testimony in the cause did not authorize them to infer, that Robert Frierson, the husband, had conceded the exclusive right and title to the said four negroes to be in the plaintiff, not only as it respected the three slaves that remained in his possession, but also as respected George, though he had been in the possession of a son of the plaintiff's, with the consent of defendant's testator, for about twelve years; and that, from the testimony, they must find for the defendant."

The plaintiff excepted to this charge; and she now assigns it for error, together with the admission of the evidence objected to.

ORMOND & NICOLSON, for plaintiff in error:

1. According to the proper construction of the entire will, the plaintiff in error took a separate estate in the four slaves sued for. The residuary clause declares, that, at the death of the testator's wife, his negroes should be divided equally among his five daughters, share and share alike; "my negroes" is the expression, manifestly referring to all the negroes given by his will. Though the testator had, by the first clause, given to his wife an absolute estate, yet the residuary clause cuts it down to a life estate, so as to give effect to the entire will. It is contended, that the testator left other negroes, not mentioned in the will, upon which the residuary clause can operate. Admitting this for the present, still it is clear, that, upon the death of the wife, an equal division was to take place of the negroes, and the daughters were to take a separate estate in them.

The daughters were married women. What possible motive could exist, for giving the negroes which were to go to them immediately upon the testator's death, in such a way that their husbands would immediately take them, and then give them a separate estate in those slaves which were to go to them after the death of their step-mother, an event which might not happen for many years, and in fact has not yet happened? It is impossible to suppose that such a disposition could be intended, as it would give the daughters a separate estate in those slaves which they might never live to enjoy, and leave those which were to go immediately into their possession subject to the claim of their husbands. The will was made twenty years since; the remainder has not yet fallen in; and the husband of the plaintiff is long since dead. So that the protection which the father threw around the interests of his daughters was illusory, according to the construction of the will adopted by the court below. Sherrat v. Bently, 2 Mylne & K. 149.

2. The court certainly erred, in the charge given to the jury. The proof shows, that the husband admitted that the slaves belonged to his wife; that he hired them from her, executing an instrument promising to pay her their hire, and that he did so; that he delivered one of them, at the expiration of his term of hiring, by the plaintiff's direction, to her son, with whom

he remained twelve years. The execution of the note for the hire, was as distinct and unequivocal an admission as could be made, and brings the case within the principle of Puryear v. Puryear, 12 Ala. 13, and 16 ib. 486. As to the negro who was delivered to the plaintiff's son, and kept by him for twelve years, until the testator's death, the inference is absolutely irresistible, that the husband admitted the exclusive right of his wife. His title, if he had any, was gone, by the statute of limitations. In addition to the cases already cited, see Slanning v. Style, 3 P. Williams 337. As to the right of the wife to sue on a contract made with her husband, see 2 Barn. & Adol. 447; 22 Eng. Com. Law R. 119; 6 Mees. & W. 422.

3. We also contend, that the court erred in permitting parol testimony to explain the will.

E. W. PECK, *contra:*

The will of plaintiff's father did not give her a separate estate in the slaves sued for; consequently, on the delivery of them, by her father's executor, to her husband, defendant's testator, his title became perfect, by virtue of his marital rights. O'Neal et al. v. Teague, 8 Ala. 345; Welch v. Welch, 14 ib. 76–81; Lenoir v. Rainey, 15 Ala. 667. This title was in no wise affected by the subsequent admissions or declarations of defendant's testator, because they were made in ignorance of his legal rights. Gamble v. Gamble, 11 Ala. 966; Machen v. Machen, 15 ib. 375; Moore v. Hitchcock, 4 Wend. 292. And the alleged hiring from his wife stands upon the same principle.

GOLDTHWAITE, J.—It is urged, that, by a correct construction of the will of Thomas McRae, the plaintiff in error took a separate estate in the four slaves specified in the third clause; and this construction is attempted to be supported upon the succeeding clause, by which the testator declares, that, at the death of his wife, his negroes are to be divided between his five daughters, share and share alike. But if this construction was adopted, it is clear that the plaintiff in error could not recover, as, by the clause last referred to, the division of the slaves was not to take place until after the death of the testator's wife; and, as it is conceded that she is still

living, the plaintiff in error could not have the entire interest in the slaves, and consequently could not maintain the action. Miller v. Eatman, 11 Ala. 609.

But this construction of the will cannot be supported. The testator, by the first clause, makes a specific and absolute bequest to his wife of sixteen negroes, and then, after certain specific legacies to his children, follows the residuary clause, giving to his wife the remainder of the estate, both real and personal, during the term of her natural life, with the direction, that no sale or alteration of the plantation, stock or household furniture, or any other thing, should be made until her death; that then, it is his will, that his negroes be divided between his five daughters, share and share alike, for their use, during the term of their natural lives, and not subject to the debts of their husbands, and at their deaths, to their heirs forever; and that the residue of his estate, both real and personal, be divided among four of his daughters, whose names are specified, share and share alike. It is, we think, perfectly clear, that the negroes which are referred to in the last clause mentioned, and which, at the death of his wife, are to be divided among his daughters, are the slaves which are given to the wife by the specific bequest; or, if he left other slaves not specifically bequeathed, it might include such slaves only; but after giving to one daughter eleven negroes, to another four, and to another two, there is no reasonable or sensible construction, which would authorize us to infer that these legacies were to be revoked, and that his entire negro property was to be divided amongst the five daughters equally.

Upon the supposition, that the slaves which the daughters were to take after the death of the wife referred to the slaves given to her by the first clause of the will, the only inconsistency is, in giving a life estate to the wife, instead of a fee simple; while on the other hand, the construction insisted upon would operate as a revocation of several specific legacies, and make an entirely different appropriation of a large portion of the estate. Our conclusion, therefore, is, that the four negroes were a present, specific and absolute bequest, and that, under the will, the plaintiff in error would take a separate estate in those slaves only which, by its terms, she was to take at the death of the testator's wife.

But it is urged, that, even if the will of Thomas McRae did not invest the plaintiff in error with a separate estate in the slaves sued for, it appears from the record that evidence was offered, on the trial below, tending to prove that the testator of the defendant in error, who was the husband of the plaintiff in error, had admitted her right to the slaves in controversy, hired them from her, and permitted one of them, at her request, to remain in the possession of her son by a former marriage, nearly or quite twelve years; and that the court erred, in instructing the jury, that they could not, from evidence of that character, infer that he had conceded the exclusive right to the slaves to be in his wife. The rule is well settled, that at law, where the title to the property has vested in the husband, as in the case of a gift or bequest to the wife, no contract which he might afterwards make *directly* with her, and *a fortiori* no declaration or admission made by him during coverture, can vest the property in the wife, so as to enable her to maintain or resist an action by or against the representative of the husband. Machen v. Machen, 15 Ala. 373; Gamble v. Gamble, 11 Ala. 966. The decisions which we have referred to are conclusive upon this point, and apply with the same force to the slave which was permitted to go into the possession of the son of the plaintiff in error, as to the other slaves. His possession was not adverse to the husband; and the length of time he may have retained him, under the contract with or concession to the wife, did not invest her with the legal title.

In relation to the objection which is founded on the ruling of the court below in admitting parol evidence, to explain the will of Thomas McRae, we are satisfied that it was irrelevant; but as it could only have been offered to show that the plaintiff in error did not take a separate estate in the slaves sued for, and as the will, under the construction which we have given to it, was conclusive upon that question, without the aid of such evidence, no prejudice could have resulted to the plaintiff in error from its admission. The admission of irrelevant testimony will reverse, unless the record clearly shows that no injury could have resulted. It is not enough, that the court is not able to discover injury; it must see, and see clearly, that none could have resulted. If, for instance,

the whole of the evidence objected to could be withdrawn, and the party in whose favor it was offered still be entitled to a verdict, it is apparent that the opposite party could not, in such a case, be prejudiced by its admission. This was the situation of the case under consideration. The will referred to showed, upon its face, that the plaintiff in error was not entitled to a separate estate in the slaves which she was attempting to recover, and the evidence objected to was cumulative, upon a point that was established as a legal conclusion from the other facts of the case.

There is no error in the record, and the judgment is affirmed.

DRANE *vs.* KING & DEVITT.

1. A judgment *nisi* against a defaulting garnishee, for "the sum of sixty-three dollars debt, and twenty-six dollars and seventy-six cents damages, with interest thereon from the second day of October, 1848," is sufficiently certain.
2. Where judgment final is rendered for a larger amount than the judgment *nisi*, the discrepancy can only be considered a clerical misprision, and the judgment will be amended in the Appellate Court, at the costs of the plaintiff in error.

ERROR to the Circuit Court of Lauderdale.

Tried before the Hon. S. C. POSEY.

King & Devitt recovered a judgment in the Circuit Court of Lauderdale, against Matthew C. Galloway, upon which process of garnishment was afterwards issued, and Thomas L. Drane was summoned to appear before said court, at its next term, to be held on the first Monday after the fourth Monday in March, 1849, and answer as to his indebtedness to Galloway. The garnishee failed to appear, and a judgment *nisi* was rendered against him on the seventh day of the term, for "the sum of sixty-three dollars debt, and twenty-six dollars and seventy-six cents damages, with interest thereon from the second day of October, 1848, being the amount of plaintiff's judgment against said Matthew C. Gal-

loway." Upon this judgment a *scire facias* was issued, returnable to the October term of said court, which was returned executed; but the garnishee again failed to appear, and thereupon judgment final was rendered against him. This judgment, after reciting the rendition of the judgment *nisi*, the issue of *scire facias* thereon, its service and return, and the garnishee's failure to appear, continues thus: "It is therefore considered by the court, that the judgment *nisi* aforesaid be in all things confirmed; and that the plaintiffs recover of said defendant Drane the sum of sixty-three dollars, the debt, together with the further sum of thirty-two dollars and two cents, damages sustained by plaintiffs by reason of the detention of said debt; said sums being the debt, damages and interest of the judgment of these plaintiffs against Matthew C. Galloway."

The errors assigned are:

1. That the judgment *nisi* is uncertain, insufficient, and irregular;

2. That the judgment final is different from the judgment *nisi;*

3. The record does not show that King & Devitt had recovered a judgment against M. C. Galloway;

4. The record does not show that the judgment *nisi* was rendered after the fourth day of the term;

5. The record does not show that the judgment final was rendered after the fourth day of the term;

6. The rendition of the judgment final.

D. P. LEWIS, for plaintiff in error.
WILLIAM COOPER, *contra.*

DARGAN, C. J.—1. A judgment *nisi*, like a judgment final, must be for a sum certain. Dickerson v. Walker, 1 Ala. 48. But we entertain no doubt that the judgment *nisi* in the present case is sufficiently certain; it is for sixty-three dollars, the debt, and twenty-six dollars and seventy-six cents damages, with interest from the second day of October, 1848. Without resort to any extraneous fact, we can ascertain the precise amount of this recovery. It is therefore certain; for *id certum est quod certum reddi potest.*

2. It is again insisted, that the final judgment varies from the judgment *nisi*, and therefore is erroneous. The judgment *nisi*, as has been stated, is for sixty-three dollars debt, twenty-six dollars and seventy-six cents damages, with interest on these two sums from the second of October, 1848, up to the time the conditional judgment was rendered; whilst the final judgment is for sixty-three dollars, the debt, and thirty-two dollars and two cents, being the damages with the interest included. The final judgment is for a little more than the judgment *nisi*. The amount of interest that had accrued on the judgment against Galloway at the time the judgment *nisi* was rendered, was only three dollars and thirty-nine cents, which, if added to the damages, would make thirty dollars and fifteen cents. The final judgment, therefore, does not correspond in amount with the judgment *nisi*, but the discrepancy can only be considered as a clerical mistake, and therefore amendable under our statute in this court. The final judgment only confirms the judgment *nisi*, and makes it unconditional, (and this the final judgment does in the case before us,) and if, in stating the amount of the recovery, it differs from the judgment *nisi*, it may be corrected in this court, as a mere clerical misprision, at the cost of the plaintiff in error.

The other errors are disproved by the record.

Let the final judgment be amended, and affirmed.

EX PARTE KEENAN.

1. An appellate court will not reverse the proceedings of an inferior tribunal, for an error which works no injury to the party complaining.
2. But error implies injury, and must reverse the judgment, unless the record itself repels the presumption of injury, and shows that, notwithstanding the error, there was no injury, (*per* Dargan, C. J.)
3. When application is made to a circuit judge for a *certiorari*, to review the proceedings of the Commissioners' Court in the establishment of a road, the petitioner *prima facie* shows *legal* injury, by showing that the road was illegally established, and that it runs through his land; and the writ should be granted.

MOTION for a *mandamus* against the Hon. EZEKIEL PICKENS, Judge of the Second Judicial Circuit.

The petitioner, M. J. Keenan, made application to the Hon. E. Pickens for a *certiorari*, to remove into the Circuit Court certain proceedings had by the Commissioners' Court of Dallas in the establishment of a road. The petition alleged that the road, as established, ran two miles through the petitioner's land, and that the thirty days' notice required by the statute had not been given previous to the order establishing it. The proceedings of the Commissioners' Court are appended to the petition, and several other errors therein are alleged, which it is unnecessary to enumerate.

The Circuit Judge refused the writ, and a motion is now made for a *mandamus* against him, to compel its issuance.

WATTS, JUDGE & JACKSON, and GAYLE & GAYLE, for the motion.

CHILTON, J.—This is an application for a *mandamus* to the Honorable Ezekiel Pickens, Judge of the Second Judicial Circuit, to command him to award a *certiorari* to bring before the Circuit Court of Dallas county certain proceedings had before the Commissioners' Court of Roads and Revenue establishing a road, that the same might be reviewed.

Judge Pickens waives the alternative *mandamus*, and consents that the petition here filed be considered as true, and also admits that he refused to grant the fiat for the writ of *certiorari*, because he was of opinion the petition, although it might show legal error, did not show that evident injustice had been done the petitioner.

The rule undoubtedly is, that a court will not reverse the proceedings of an inferior tribunal for an error which works no injury to the party complaining of it. Stone v. Stone, 1 Ala. Rep., 582; Holmes v. Gayle, ib., 517; Lawson v. Orear, 7 Ala. Rep., 784. In this case, however, conceding that there was error in establishing the road, it is impossible to say it worked no injury to the petitioner, since he shows the road complained of will run about two miles through his lands. He *prima facie* shows injury, when it is made to ap-

pear that the road has illegally been established over his land. We mean legal injury, as contra-distinguished from any actual damage; for, although the road may be of benefit to him, yet if illegally established upon the land, he is as much entitled to revise and reverse the proceedings, as he would the judgment of a court rendered upon an insufficient declaration to which he had demurred.

Without passing upon the record of the proceedings before the Commissioners' Court, we think such a case was made out as *prima facie* entitled the petitioner to the writ of *certiorari*.

Let a *mandamus* issue.

DARGAN, C. J.—I think the Circuit Judge should have awarded the writ of *certiorari*. It is true, that a naked error, without injury, will not reverse a judgment, but my understanding of the practice is, that an error shown implies injury, and must reverse the judgment, unless the record itself repels the implication of injury, and shows that, notwithstanding the error, there has been no injury. Now the error in the Commissioners' Court is, that the petitioners for the road did not give the notice required by the statute. Digest 507. This error, as the record is now presented to us, exists, and there is nothing in the record to cure it, nor can we say that it is an error without injury.

CROW *vs.* HUDSON.

1. In assumpsit to recover the proceeds of a note placed by plaintiff in defendant's hands for collection, on which defendant brought suit, for his own use, in the name of the payee, and recovered judgment, whereon execution was issued, and levied on certain bales of cotton, which were purchased at sheriff's sale by defendant, the return of the sheriff on the execution is not conclusive against the plaintiff, as to the amount of the proceeds of the sale.

ERROR to the Circuit Court of Benton.

Tried before the Hon. L. P. WALKER.

ASSUMPSIT by Crow against Hudson, to recover the proceeds of a note on one Williams, which plaintiff had placed in defendant's hands for collection. The defendant's receipt for the note was read in evidence on the trial, by which he promised to account for the note when the plaintiff paid him $300. It was shown, that the defendant recovered a judgment on the note, in the County Court of Benton, in the name of the payee, for the use of himself; that an execution was issued on this judgment, which was levied on eighteen bales of cotton; that said cotton was sold by the sheriff, under said execution, and was bid off by the defendant, some at 6¼ cents per pound, and the rest at 5¼ cents; that the cotton, at the time of the sale, weighed about 450 lbs. per bale, at which weight the proceeds of sale would have amounted to $479 25; and that the sheriff, in settling with the defendant, and in making his return, estimated the cotton at the weight put upon it by the commission merchants in Wetumpka, thus making the proceeds only amount to $319 77.

The court charged the jury, that the sheriff's return on the execution was conclusive, in this suit, and between these parties, as to the amount for which the cotton was sold at the execution sale. The plaintiff excepted to this charge, and he now assigns it for error.

WHITE & PARSONS, for plaintiff in error:

The charge of the court is erroneous. Crow is not concluded by the sheriff's return on the execution, because he is not a party to it, nor to the record. At most, the return is but a record, and strangers are not estopped by a record. St. John v. O'Connell, 7 Porter, 476, and cases there cited; Blann v. Chambless, 9 ib. 412. As to who are parties, see 1 Greenleaf on Evidence, §§ 523 to 528.

J. B. MARTIN, *contra:*

1. The return of a sheriff cannot be impeached collaterally. He is a sworn public officer, to whom the law gives credit. Crafts v. Dexter, 8 Ala. 767; Clark v. Garey, 11 ib. 98; Governor, use &c. v. Bancroft, 16 ib. 605.

2. Crow, in this action, claims under the judgment and execution. Hudson, Crow's agent, had the right to rely upon

the sheriff's return, as showing the true amount for which the cotton sold; and, if that return is false, Crow has his remedy directly against the sheriff, but he cannot be allowed to falsify his return, for the purpose of charging Hudson. Phil. on Ev. C. & H.'s Notes, 1087–8; 4 Ohio R. 155; Bean v. Parker, 17 Mass. 591; 1 Litt. 16; 18 Vermont, 67; 6 N. Hamp. 393.

Did not Crow and Hudson sustain to each other the relation of bailor and bailee? and if so, are they not concluded by the same evidence? See Hare v. Fuller, 7 Ala. 717, and cases there cited.

GOLDTHWAITE, J.—The only question in this case is, whether, on the trial below, the return of the sheriff of the amount brought by the sale of the cotton levied on, was conclusive evidence of that fact, as to the plaintiff in error. Giving to the return the force of a record, the rule is, that it would bind only parties and privies. The plaintiff in error was not a party to the proceeding; and it is only necessary, therefore, to determine whether he was a privy, within the meaning and operation of the rule.

Privity denotes mutual or successive relationship to the same rights, 1 Green. Ev. § 523; and, as to the defendant in the original suit, who was the maker of the note, in any judgment or proceeding in such suit, the interest of the plaintiff in error would have been identical with that of the party to whom the transfer of the note was made; and for that reason, the maker of the note could regard him as a privy in such proceeding. But, as to the plaintiff in such suit, he does not occupy the same position, and, so far as he is concerned, is not to be regarded as a privy. Their identity of interest is confined to the proceeding against the maker of the note. A party is not allowed to build up an estoppel in his own favor; and an assignor is not bound, in a suit against him by the assignee, by a judgment in favor of the maker, ascertaining the fact of payment previous to the assignment, unless the assignor had due notice of the first action, and an opportunity to defend it. Maupin v. Compton, 3 Bibb's R. 214.

Upon analogous principles, the plaintiff in error was not bound by the return of the sheriff, on the execution issued

on the judgment in favor of the defendant in error against the maker of the note, St. John v. O'Connell, 7 Porter, 476; and the charge of the court, that such return was conclusive, was erroneous.

For this error, the judgment is reversed, and the cause remanded.

SPENCE *vs.* SIMMONS

1. In *scire facias* against a defaulting witness, where no declaration is filed on the return of the writ, the writ itself must show, by positive averment, that a subpœna had been issued and served, and then set out the judgment *nisi* in substance; the writ is insufficient if it only sets out the judgment *nisi*, which recites that the plaintiff appeared and *suggested to the court* that a subpœna had been issued and returned executed.

ERROR to the Circuit Court of Coosa.

Tried before the Hon. JOHN BRAGG.

JOHN T. MORGAN, for plaintiff in error.

DARGAN, C. J.—This was a *scire facias* against Spence as a defaulting witness, to show cause why a judgment *nisi* should not be made absolute. There was no declaration, and the judgment was by default; consequently the only question is, the sufficiency of the *scire facias*.

It is not indispensably necessary to file a declaration upon the return of a writ of *scire facias*, but the writ itself may be considered as the declaration, and always is under our practice, unless indeed a declaration be in fact filed. But when no declaration is filed, the *scire facias* (except in cases upon forfeited recognizances, in reference to which we have special legislation) itself should show every material fact to entitle the plaintiff to a judgment. It should show by positive averment that a subpœna had been issued, and that it had been served, and then set out in substance the judgment *nisi*, rendered on account of the failure of the witness to attend. See Emanuel v. Ketchum, at the present term. But in the

case before us, there is no averment of the issuing of the subpœna, nor of its service; the *scire facias* is, therefore, fatally defective. It is true, that the judgment *nisi* is set out, and that shows that Simmons appeared, and suggested to the court that a subpœna was issued, which was returned executed. But this averment in substance is, that it was suggested to the court that those things were done, and not a positive averment that they were; that is, that a subpœna was issued and had been executed. According to the case of Emanuel v. Ketchum *supra*, such an averment is insufficient.

Let the judgment be reversed, and the cause remanded.

CHILTON, J. not sitting.

KAVANAUGH *vs.* THE STATE BANK.

1. Under the act of February 11, 1850, (Pamphlet Acts, 34,) which abolished the County Courts, the Circuit Court has jurisdiction of a motion against a sheriff for failing to pay over money collected on an execution which was issued from the County Court before its abolition.

ERROR to the Circuit Court of Tuskaloosa.

Tried before the Hon. THOMAS A. WALKER.

This was a summary proceeding by motion, made at the September term, 1850, of the Circuit Court of Tuskaloosa, against the plaintiff in error, as sheriff of Madison county, for failing to pay over money collected by him on an execution, which issued from the County Court of Tuskaloosa before its abolition, on a judgment previously rendered in said court, in favor of the Bank against Joseph Cloyd, Geo. W. Drake and Thomas McCrary.

The sheriff appeared by attorney, and insisted that the Circuit Court had no jurisdiction to proceed against him in this summary way, inasmuch as said execution was issued from the County Court before its abolition; but the court ruled otherwise, to which he excepted, and now assigns its ruling for error.

E. W. PECK, for plaintiff in error.

P. & J. L. MARTIN, *contra.*

CHILTON, J.—The only question in this case is, has the Circuit Court, to which the records and papers of the County Court have been transferred by the act of 11th February, 1850, jurisdiction of a motion against the sheriff for failing to pay over money collected by virtue of an execution issued from the County Court before said court was abolished.

The statute authorizing such motions, requires them to be made in the court in which the judgment was rendered. Clay's Dig. 218. And it follows, that, unless the statute above referred to, abolishing the County Court, and transferring its papers, records, &c., to the Circuit Court, gives the latter court jurisdiction, it had no right to proceed in this case.

The thirty-sixth section of that act provides for depositing the papers and records of the County Courts in the office of the clerks of the Circuit Courts, and for the issue, by the clerks of the Circuit Courts, of writs of execution, of *scire facias*, and of error, and for giving exemplified copies of the record, &c. The forty-second section repeals all laws contravening the provisions of the act. The forty-third enacts that the same jurisdiction and system of practice which the County Courts possessed, saving the jurisdiction conferred by the act on the Probate Court, should be conferred on the Criminal Court of Mobile county. The forty-fourth section increases the salary of the judge of said Criminal Court; and the forty-fifth section provides as follows: "*Be it further enacted*, That sheriffs and other officers shall be liable to the same proceedings by summary notice, for failing to execute or return process, or for failing to collect or pay over money, as heretofore existing under former laws."

The counsel contends, that the section of the act last quoted has reference to the Criminal Court alone, and has no applicability to the Circuit Courts. If this construction be correct, the section was altogether supererogatory; for none of the records or papers of the County Court are, by the act, transferred to the Criminal Court, and by the forty-third section, jurisdiction is conferred upon the Criminal Court co-

extensive with the powers before vested in the County Courts, except so far as the act confers powers on the Probate Court, which it creates. So that this court would, aside from the forty-fifth section, have ample jurisdiction of such motions, in respect of its own process, under the general law, and can take none upon process issued by the County Court, as none is made returnable to that court.

But it is needless to pursue the subject. We do not entertain a doubt but that the forty-fifth section was intended to put to rest the very question here raised. For it might very reasonably have occurred to the legislature, that, inasmuch as these summary motions imposed in some cases heavy penalties upon defaulting officers, it might well be argued that they were not given upon process issued out of the County Court after that court was abolished. Hence, an express declaration of the legislative intention, that the sheriffs and other officers should be liable to the same proceedings by summary notice, &c. The section is general in its terms, and we see no reason for restraining its operation to the Criminal Court, which needed no aid from it to render its jurisdiction complete; whereas, the Circuit Courts, without it, are powerless to afford such relief upon process issued on judgments rendered by the County Court—and every reason which prompted to the enactment of the summary remedy pursued, or which forbids its repeal, is available as a motive which may be supposed to have influenced the legislature in conferring the jurisdiction in cases like the one before us. Indeed, the act of transfer would have been wanting in completeness without such provision, as it would have deprived parties of summary remedies they would otherwise have had, and which were afforded to other plaintiffs in judgments.

It is said these summary remedies are penal in their character, and should be strictly construed; that they cannot be aided by intendment. This may be conceded, without at all interfering with the position we have attempted to sustain; for we are called on, not to construe the statute giving the summary remedy, but the remedial statute abolishing an inferior court, and conferring its jurisdiction upon another and higher tribunal. It would be difficult to conceive of a reason for rendering the Circuit Court less efficient in affording

remedies to parties who had been referred to it, than the County Court was, or the same court is as to parties who have obtained judgments in it.

It remains but to add, that the judgment of the Circuit Court must be affirmed.

RAMEY *vs.* HOLCOMBE.

1. Where a contract is made for personal and individual services, at a stipulated price, and for a specific period, the party whose services are thus engaged, upon being discharged by the other without cause, before the expiration of his term of engagement, may recover the amount agreed to be paid for the entire term.
2. He may, however, consider the breach of the contract by the opposite party as terminating the contract before the period fixed for its performance; but, in such case, it is doubtful whether the same rule as to damages would apply.
3. A contract by which plaintiff undertook, for as pecified time, and at a stipulated price, payable quarterly, "to feed and have attended to the hack horses of" the defendant; "to treat said horses as well as stage horses are usually treated; to have them harnessed, or to assist the driver in doing so, when necessary; to have them taken to the shop to be shod;" and also to board the driver, is not a contract for the personal services of the plaintiff, but may be assimilated to a contract for work to be performed, or materials to be furnished, at a stipulated price; and the measure of damages for the breach of such a contract would be, a *pro rata* compensation, according to its terms, for the time during which plaintiff had performed it, and the profits which he could have made by it during the remainder of the time.

Error to the Circuit Court of Cherokee.

Tried before the Hon. L. P. WALKER.

COVENANT by Holcombe against Ramey, for a breach of the following contract:

"A contract, made this 2d day of July, 1844, between William Ramey and Benjamin Holcombe; First, the said Benjamin Holcombe undertakes to feed and have attended to the hack horses of the said Ramey, for a term of time to expire the 1st July, 1846, at the price and rate of one hundred and fifty dollars per year; and the said Holcombe binds himself to treat the said horses as well as stage horses are usually

treated, and to have the said horses harnessed, or to assist the driver in doing so, when necessary, and to have them taken to the shop to be shod, &c.; and the said Holcombe agrees farther to find the driver of said Ramey, without any further pay than what is named above.

Second; The said Ramey agrees, on his part, to pay the said Holcombe, for the above named services, thirty-seven dollars and fifty cents for each quarter, or three months; this from the first day of July, 1844, during the said term of time; which amount is to be paid within the first month after each quarter expires. Death of either party, or a discontinuance of the line by the Department, is to release the parties from the above obligation, except up to the time of said discontinuance or death. Signed and sealed the day and year first written." (signed) B. HOLCOMBE, [seal]
WE. RAMEY. [seal]

On the trial below, the plaintiff offered evidence showing that he had kept the horses, and performed the other services stipulated on his part, until November 8, 1844, at which time the horses and driver were removed by the defendant, without the permission of the plaintiff, and against his objection. He also offered evidence to show his readiness and ability to comply with the contract on his part, and that he offered to do so at the time the horses and driver were removed. It was also shown, that the defendant had paid the plaintiff, according to the terms of the contract, up to October 2, 1844. The suit was commenced in January, 1847.

Upon this evidence the court charged the jury: "That the contract was, in its nature, entire; and if the proof satisfied them that the plaintiff had, up to the time of its abandonment by the defendant, truly performed his undertaking according to its terms, and had been ready and willing, and had so proffered, to perform it, for and during the entire term for which he had stipulated, then, in that event, the measure of damages was, the amount which, by the terms of the written contract, the defendant had contracted to pay quarterly; and that plaintiff would be entitled to recover said amount, with interest on each quarter's dues respectively, from one month after their expiration." To this charge the defendant excepted.

The defendant asked the court to charge the jury:

1. That, if they believed from the evidence that the contract was as above set forth, and that the plaintiff well and truly performed it on his part, until November 8, 1844, when the defendant removed his horses and driver, against plaintiff's objection; and if they believed that defendant had paid plaintiff, according to the contract, for his services up to October 1, 1844, and that defendant did not keep his horses or driver at plaintiff's after November 8, 1844; then, plaintiff would not be entitled to recover the entire amount agreed to be paid per quarter, for a longer time than from October 1, to November 8, 1844;

2. That, if plaintiff performed the contract on his part, up to November 8, 1844, and from that time the defendant prevented him from the performance of his contract, plaintiff continuing ready and willing to perform, then the measure of damages to which plaintiff would be entitled, after November 8, 1844, would be, the difference between the cost of performing his contract by plaintiff, and the price agreed to be paid by defendant. The court refused to give either one of these charges, and to each refusal defendant excepted.

The charge given, and the refusals to charge as requested, are severally assigned for error.

J. B. MARTIN, for plaintiff in error:

The general rule is well established, that the damages to be recovered in cases of this character, in the absence of fraud, must be such as are the natural and proximate consequences of the breach complained of. It is not the object of the law to punish the party who has violated or abandoned his contract, for he may have done so from necessity; but to place the other party in the condition which he would have occupied, had the contract been faithfully executed. In this case, the measure of damages is, the difference between the amount which it would have cost the plaintiff to execute the contract on his part, and the amount which he was to receive for it, by the terms of that contract; that is the amount which he would have received, if the contract had been fully performed on both sides, and it is, therefore, the amount to which he is entitled by way of remuneration for

this loss. 2 Green. Ev. 210; George v. Cahaba R. R. Co., 8 Ala., 234; Shannon v. Comstock, 21 Wend., 457; 5 Serg. & R., 19.

The measure of damages laid down by the court below, allowed the plaintiff compensation for feeding and taking care of defendant's horses for two years; when, in fact, he had only fed them for three months; and thus he will have received compensation twice for the same services. Loker v. Damon, 17 Pick., 284; Thompson v. Shattuck, 2 Metcalf, 615; Guild v. Guild, ib., 229; 7 Greenl., 51.

WHITE & PARSONS, *contra:*

The defendant in error has the right to stand on the terms of his contract, and to hold himself in readiness to perform it until the close of the stipulated period. The ruling of the court on this point is in exact conformity with the decision of this court in Davis v. Ayres, 9 Ala., 292; 9 ib., 24; 12 ib., 9.

GOLDTHWAITE, J.—Upon authority it is well settled, that where a contract is made for personal and individual services, as in the case of clerks, overseers, agents, &c., at a stipulated price, and for a specific period, the party whose services are thus engaged, upon being discharged by the other party without cause, before the expiration of the term of his engagement, may recover the amount agreed to be paid for the entire term. Sprague v. Morgan, 7 Ala., 952; Davis v. Ayers, 9 ib., 292; Martin v. Everett, 11 ib., 375. He is not compelled to treat the contract as ended by the act of the opposite party, but may consider it as continuing for the full term; and in such case, his right to recover the full amount rests upon the fact, that the contract is entire, and the service personal, thus rendering it necessary, if he wishes to recover the amount stipulated to be paid for the whole term, that he should enter into no engagement which would prevent the performance of the entire agreement on his part. Costigan v. Mohawk & Hudson Rail Road Co., 2 Denio, 609. He may, however, consider the breach of the opposite party as terminating the contract before the period fixed for its performance; but in such case, it is doubtful whether the same

rule as to damages would apply. Masterton v. Mayor of Brooklyn, 7 Hill, 62.

In the case under consideration, the contract cannot be regarded as a contract for personal services, in the sense in which we have used this term. The defendant in error was to furnish the horses of the plaintiff in error with feed, his driver with board, and to have certain other services performed, none of which he was required, either expressly or by implication, to render in person; and for which the plaintiff in error was to pay at stated times, and for a certain period, a stipulated sum. The contract may properly be assimilated to an agreement for work to be performed, or materials to be furnished, at a stipulated price; in which case, the measure of damages is held to be, the difference between the cost of the work or materials and the amount agreed to be paid. George v. Cahaba Rail Road Co., 8 Ala., 234. The defendant in error, according to this rule, would be entitled to a *pro rata* compensation, according to the terms of the contract, for the time during which he had performed the agreement, which had not been paid, and for the profits which he could have made during the remaining time it had to run; or the difference between the cost of the feed, board and services, during such time, and the amount which he is entitled to receive during such time according to the rate established by the contract.

The charge of the court being in conflict with these views, the judgment must be reversed, and the cause remanded.

PATTERSON *vs.* THE STATE.

1. Where a person is indicted for selling spirituous liquors to a slave, and it is proved that the liquor was sold, in his absence, by his clerk, it is error to instruct the jury, "that, if the defendant had previously sanctioned the acts of his clerk in selling liquor to slaves under similar orders, and if they believed that the defendant, if he had been present, would have done as his clerk did. then they were authorized to find him guilty."

ERROR to the Circuit Court of Wilcox.
Tried before the Hon. E. PICKENS.

WATTS, JUDGE & JACKSON, and A. P. BAGBY, for plaintiff in error.
M. A. BALDWIN, Attorney General, *contra.*

CHILTON, J.—The defendant Patterson was indicted for selling spirituous liquor, viz: a half gallon of rum, &c., to a slave, without the written permission required by the statute. It appears that the liquor was sold by the defendant's clerk in his absence. The court charged the jury, that, if they believed the defendant was absent at the time the clerk sold the liquor, and knew nothing about it, he was not guilty; but if the selling to slaves under similar orders had been previously sanctioned by the defendant, and that the defendant, if he had been present, would have done as the clerk did, then they were authorized to find him guilty.

This was equivalent to charging the jury, that they were authorized to imply the clerk's authority to sell in the manner he did from the ratification of his previous acts by the principal, and that if, in this case, he was doing what the master, if present, would have done, then the master was guilty, as the clerk acting for him had not transcended his authority. This charge is erroneous. The principal is bound, if he authorized or co-operated in the illegal act of the clerk; but we think this must be an express, not an implied authority. We have no right to conclude that, because he has sanctioned previous violations of the law, he will continue to do so; on the contrary, as every party is to be presumed innocent until his guilt is made manifest, we should presume that he repented his former transgression, and therefore did not assent to the subsequent violation. At all events, we cannot imply an authority.

The judgment is reversed, and cause remanded.

CARRADINE *vs.* O'CONNOR.

1. A decree may be rendered without proof, when the bill has been taken for confessed on personal service, whether the defendant be a resident or a non-resident, (Clay's Digest, 354, § 58.)
2. The fact that a mortgage contains a power of sale does not deprive a court of chancery of jurisdiction to foreclose.

ERROR to the Chancery Court of Mobile.
Heard before the Hon. J. W. LESESNE.

BOYLES, for plaintiff in error.
TAYLOR, *contra.*

CHILTON, J.—This was a bill filed by the defendant in error against the plaintiff in error to foreclose a mortgage on certain property, containing a power of sale, made by Carradine to O'Connor, to secure the payment of a promissory note for four hundred dollars, bearing even date with the mortgage, namely, the 18th day of December, 1851, and due thirty days after the date thereof.

The bill is in the usual form, and prays an account to be taken of the debt due to the plaintiff, and that the property be sold to pay the same. Process of subpœna was regularly executed on the defendant, who refused to answer, and a decree *pro confesso* was rendered against him. The mortgage and note, with the protest, were introduced and proved, the same being exhibits to the bill, and the case was referred to the master to report the amount due. His report was duly made, read as the statute requires, and confirmed by the Chancellor, who decreed that the property be sold, under the usual notice prescribed by the decree, for the payment of the sum so reported; that the proceeds be brought into court, and that an order of seizure issue to obtain possession of the property so as to carry the decree into effect.

A number of errors have been assigned on the decree, but the parties have submitted the case without any argument.

We have looked into the case, and are unable to perceive

any error. Indeed, the proceedings seem to have been conducted with more than usual accuracy, and to conform to the strictest rules of chancery pleading.

1. The objection taken by the first assignment, that the decree was rendered on the bill without proof, is not sustained by the record; for that shows, that the mortgage and note were proved. But, aside from this, it is settled, that under our statute (Clay's Dig. 354, § 58) a decree may be rendered without proof, when the bill has been taken for confessed on personal service, and this, whether the defendant be a resident or non-resident. Wellborn v. Tiller, 10 Ala. 306; Butler v. Butler, 11 ib. 668; Arnold v. Sheppard, 6 ib. 299.

2. The fact that the mortgage contains a power of sale, does not deprive the Court of Chancery of jurisdiction, as is supposed by the second assignment of error. This point is settled in McGowan et al. v. Branch Bank at Mobile, 7 Ala. 823, and Marriott & Hardesty v. Givens, 8 ib. 694.

The other assignments of error are fully embraced by the decisions above cited, as they are substantially a repetition of those we have noticed.

There is no error in the record, and the decree is consequently affirmed.

COTTEN *vs.* THOMPSON.

1. In a claim suit under the statute, although the claimant cannot defeat the execution by interposing the title of a third person, yet where he himself has an undivided interest in the property, as where it belongs to him and a third person, a stranger to the suit, he may interpose his title, and thereby defeat the execution.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

RICE & MORGAN, for plaintiff in error.

L. E. PARSONS, *contra.*

DARGAN, C. J.—An execution was issued against Solomon Spence in favor of the defendant in error, and was levied upon a slave then in the possession of one Savery. The plaintiff in error claimed the slave as his own, and made the oath and gave bond to try the right of property according to the statute. Upon the trial the testimony tended to show, that the slave belonged jointly to the claimant and to Savery, in whose possession he was at the time of the levy. The court instructed the jury, that if they believed that Savery had the possession of the slave at the time of the levy, and claimed and owned one-half interest in said slave, they must find it subject to the execution.

The case of McGrew v. Hart, 1 Por. 175, is decisive in favor of the plaintiff in error. In that case it was said, that, as a general rule, the claimant of property levied on by execution, could not interpose the title of a third person to defeat the execution. But when the claimant has an undivided interest in the property, as where it belongs to him and to some third person, not a party to the suit, this would form an exception to the general rule, and would warrant the interposition of his title, to show that the defendant in execution had none.

We do not deem it necessary to add argument to this authority. The decision has been made for many years, has regulated the practice on this subject, and can never be productive of injustice; but, on the contrary, may, in many cases, protect joint owners in the possession of their rights; we therefore cheerfully abide by it. If it had been shown that the claimant and Spence, the defendant in execution, owned the slave jointly, then a different question would have been presented, but one upon which we are not called on to express any opinion.

Let the judgment be reversed, and the cause remanded.

ANDREWS *vs.* THE UNION BANK OF TENNESSEE.

1. It is erroneous to render judgment against a garnishee, on an answer admitting, that, being indebted to the defendant in attachment, he executed certain bills of exchange, payable at a future day, to a third person, which the defendant accepted in discharge of said indebtedness, and that he had never been notified of their transfer; the payee of the bills, though not technically a transferree, is within the spirit of the act of 1840, and should be brought before the court, if the plaintiff wishes to contest the actual ownership of the debt.

ERROR to the Circuit Court of Limestone.

Tried before the Hon. SAMUEL CHAPMAN.

The Union Bank of Tennessee obtained a judgment, in the Circuit Court of Limestone, against Nathaniel Hancock and Donald Campbell, on which process of garnishment issued, and the plaintiff in error was summoned as garnishee. He appeared, and answered, that, being indebted to said Hancock individually, and to Hancock & Campbell as partners, he made certain bills of exchange, payable at a future day to Clay Stinnett, which said Hancock received in discharge of said indebtedness; and that he had received no notice of their transfer or assignment.

Upon this answer, the court rendered judgment against the garnishee, for the amount of two of the bills of exchange, with a stay of execution until their maturity. The correctness of this judgment, is the only question presented by the assignment of errors.

RICHARDSON and WM. H. WALKER, for plaintiff in error.

NICOLSON, *contra.*

GOLDTHWAITE, J.—It is clear that the court erred in rendering judgment against the garnishee, as the answer shows that the legal interest in the debt was not in either of the defendants. The bills of exchange, which constituted the only debt admitted by the answer, were payable to Clay Stinnett; and he should have been brought before the court, before a judgment could properly be rendered, as the effect

of making the bills payable to a third person was, to vest the legal title to the debt in him. Covington v. Kelly, 6 Ala., 860; Goodwin v. Brooks, ib., 836; Moore v. Jones, 13 Ala., 296. Although not technically a transferree, he was within the spirit of the act of 1840, (Clay's Digest, 63,) and should have been proceeded against under that statute, if the plaintiff wished to contest the actual ownership of the debt.

The disposition of the case upon this point may be decisive of the case, and for that reason we decline to consider the other questions presented in the argument.

The judgment is reversed, and the cause remanded.

GANAWAY & KIMBALL *vs.* THE MAYOR, ALDERMEN, &c., OF MOBILE.

1. Where a cause is removed by appeal or *certiorari* from a justice's court into the Circuit Court, the same nicety and particularity are not required in the statement of the cause of action as in cases commenced in the Circuit Court.
2. But if the statement, which is filed in lieu of a formal declaration, does not show a cause of action, the defendant may demur.
3. In an action instituted before a justice of the peace by the Mayor, Aldermen, &c., of Mobile against the defendant, for the violation of a city ordinance, and removed by appeal into the Circuit Court, the statement is fatally defective on demurrer, if it does not set forth the provision of the ordinance alleged to have been violated.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. L. GIBBONS.

The statement of the cause of action in this case, which was filed in the Circuit Court, is in these words: "This case is brought into this court by an appeal, on part of defendant, from the judgment of C. C. Langdon, Mayor of the city of Mobile, and *ex officio* justice of the peace in and for said county, in favor of the Mayor, Aldermen and Common Council of the city of Mobile against the defendant. Said judgment was rendered June 11, 1850, for the sum of fifty dollars, besides costs of suit, for violating the ordinance of the city of

Mobile that provides, among other things, that if any white person, &c., shall be anytime hereafter, within the limits of the city of Mobile, found in company, or associating, with slaves, at any lawful or unlawful meeting of such slaves, or if he, she or they harbor, secrete or entertain any slave or slaves, without the consent of his, her or their owner or owners, each and every person so offending, and being thereof legally convicted, shall forfeit and pay, for each and every offence, a fine of fifty dollars."

The defendant demurred to this statement, but his demurrer was overruled, and a verdict and judgment were rendered against him. The overruling of the demurrer is now assigned for error.

RAPIER, for plaintiffs in error.

CAMPBELL, *contra.*

CHILTON, J.—It is true, that in cases of appeal or *certiorari* from justices' courts to the Circuit Court, the same nicety and particularity will not be required in the statement of the complaint, as in cases commenced in the Circuit Court; yet the statement which the statute requires to be filed in lieu of a formal declaration, must show a cause of action, and if it does not, the defendant may demur. Such has been the constant course of practice upon this subject. Copeland v. Flowers, at this term, and cases there cited; Jones v. Buckly, 19 Ala. Rep., 604.

In the case before us, the statement is fatally defective in failing to set forth what provision of the ordinance of the city of Mobile was violated. It is clear that no cause of action is contained in the statement. The court consequently erred in overruling the defendants' demurrer.

Let the judgment be reversed, and the cause be remanded.

GALLE ET AL. *vs.* LYNCH.

1. In actions of trespass, if the damages assessed do not exceed five dollars, the plaintiff can recover no more costs than damages, unless the presiding judge will certify that the jury ought to have awarded greater damages. (Clay's Digest 316.)

ERROR to the Circuit Court of Mobile.

Tried before the Hon. L. GIBBONS.

REQUIER, for plaintiffs in error.

DARGAN, C. J.—The plaintiff brought trespass against several defendants, for an assault committed on his person. The jury returned a verdict of not guilty, as to two of the defendants, and as to the others, a verdict of guilty, and assessed the plaintiff's damages at one cent. Upon this verdict, the court rendered a judgment for full cost, without a certificate that more damages ought to have been awarded by the jury; and this is assigned for error.

The act of 1822, Clay's Dig. 316, declares, that in all suits to recover damages for slander, trespass and assault and battery, the plaintiff shall not recover more cost than damages, if the damages assessed do not exceed five dollars, unless the judge before whom the suit was tried will certify, that more damages ought to have been awarded by the jury. From this act, it is manifest that no more cost than damages should have been allowed; and see Reed v. Gordon, 2 Stewart 469; and as judgment for full cost, without the judge's certificate, was rendered, it is erroneous, and must be reversed, and here rendered for one cent damages and one cent cost; and the plaintiffs must recover of the defendant the cost of this court.

MOORE, Adm'r *vs.* LEWIS.

1. A suit cannot be maintained for a legacy, until the will has been admitted to probate; and, as the sentences of foreign courts do not operate beyond the limits of their jurisdiction, except as evidence, the probate of a will in Cuba confers no authority to proceed upon it as a will in this State, for the recovery of a legacy, although it might be evidence upon which to have the will admitted to probate here.

Error to the Chancery Court of Madison.
Heard before the Hon. D. G. Ligon.

This bill was filed by the plaintiff in error, as the administrator of Samuel Betts, deceased, to recover of the defendant in error a legacy, which, it charges, was bequeathed to said Betts by his son, Samuel Betts, jr., who resided and died in the island of Cuba. The bill charges, that the will of said Samuel Betts, jr. was duly proven in Cuba, and retained there, but it contains no allegation that it has ever been admitted to probate in this State, or in any of the United States. The object of the bill is, to charge the assets of the testator, which, it is alleged, the defendant has reduced into his possession.

The defendant demurred to the bill, for want of equity, and because it was not shown that said will had ever been admitted to probate, in any state or territory of the United States. The Chancellor sustained the demurrer, and dismissed the bill; and his decree is now assigned for error.

S. D. J. Moore, for plaintiff in error.
D. C. Humphreys, *contra.*

GOLDTHWAITE, J.—The rule is, that a suit cannot be maintained for a legacy until the will has been admitted to probate, Kerr v. Moore, 9 Wheat. 565; Sheppard v. Nabors, 6 Ala. 631; and as sentences of foreign courts do not operate, except as evidence, beyond the limits of their jurisdiction, the proof or probate of the will in Cuba conferred no authority to proceed upon it as a will in this State, although it might be evidence upon which to have it admitted to probate here.

The title of the plaintiff in error to the legacy depended upon the will, and until he had established it as such, according to the laws of this State, he could assert no right under it in the courts of this State. Armstrong v. Lear, 12 Wheat. 169. Had administration been granted in Cuba, and the property remitted to this State by the personal representative, for the purpose of paying legacies, no suit could be maintained for it, in the absence of a specific appropriation, without administration taken out here. Story on Conflict of Laws, § 515. It would be calling on the court to administer personal estate, without having the personal representative before it, which cannot be done. Logan v. Fairlee, 2 Sim. & Stu. 284.

The decree of the Chancellor was correct, and the judgment is affirmed.

TAYLOR *vs.* BRANCH BANK AT HUNTSVILLE.

1. A claimant deriving title to the slave in controversy from the defendant in execution, partly by gift and partly by purchase, consummated before the lien of the execution attached, must be regarded, in a court of law, as a purchaser for a valuable consideration, no fraud being shown in the transaction by which he acquired title.

ERROR to the Circuit Court of Benton.

Tried before the Hon. GEORGE GOLDTHWAITE.

This was the trial of the right of property to a slave named Reuben, claimed by the plaintiff in error, Taylor, after he had been levied on as the property of John Chandler, to satisfy an execution in favor of the Bank.

It appears by a bill of exceptions, that this slave had belonged to the defendant in the execution, but that before the levy, and before any lien attached to him in favor of the Bank, said Chandler being old, and having ten negroes and other property, concluded to divide and distribute his property among his children and their representatives. To this end, he caused his slaves to be valued, and the aggregate

value to be divided by ten, and the negroes were drawn for by lot. The slaves differed in value from $100 to $600; Reuben, the slave in controversy, being estimated as worth $600, and each share being something less than $300. Taylor drew this slave, and agreed to pay to the other distributees a sum sufficient to equalize his share with theirs.

It was also agreed, that the children thus receiving the property should pay the debts of said Chandler.

The proof conduced to establish the payment of $240 by Taylor to the other children to equalize his share, and that he had also paid several debts due from Chandler, in consideration of his having received said slave. These payments, however, amounted to considerably less than the value of the slave. It also appears that, at the time of the division, a bill of sale was executed to this slave by said Chandler.

The presiding judge charged the jury:

1. That, if they believed it was the object of John Chandler to give his property to his descendants, the fact that the claimant paid to other distributees certain sums of money in order to equalize their shares in said division, so as to obtain the slave Reuben for himself, would not constitute him a purchaser of said slave;

2. That, if the claimant obtained said slave from John Chandler, partly as a gift and partly as a purchase, that is, if Chandler designed to give his property to his descendants, who were to pay his debts out of it, contributing ratably to such payment, and equalizing each other's shares by payments to each other, but to retain what remained as a gift, then the property was subject.

These charges were excepted to by the claimant, and are now assigned for error.

RICE & MORGAN, and J. B. MARTIN, for plaintiff in error.

WHITE & PARSONS, *contra.*

CHILTON, J.—The Circuit Judge clearly misconceived the law in both the charges which he gave to the jury. In a court of law, we think there can be no doubt, but that Taylor occupies the position of a purchaser for a valuable consideration, and this consideration, although it may not be

equal to the value of the slave, and although the grantor designed the difference as a gift, is nevertheless sufficient to support the contract and pass the legal title to the purchaser, to whom the possession of the slave was transferred immediately upon the purchase. There is no fraud either alleged or proved in the transaction. Indeed, so far from being designed to defraud Chandler's creditors, provision is expressly made for their payment. The effect of a condemnation of the property would be, to visit on Taylor all the consequences of a fraud, by compelling him to lose what he has paid towards the extinguishment of the debts of Chandler. To this extent he has a clear equity, and he has the legal title, so that in a court of law, which is incapable of separating the interest which he has in the property from that which should be subjected to the grantor's debts, he must be regarded as the owner of the slave. A court of equity alone is competent to do complete justice between the parties, and to enforce the charge upon the property in behalf of the creditor, first refunding to Taylor the amount he has paid towards the debts of Chandler. The case of Lanier v. The Br. Bank, 18 Ala. 625, is clearly opposed to the view taken by the court below as contained in his charges.

It follows, that the judgment must be reversed, and the cause remanded.

LOVE *vs.* DARGAN.

1. In assumpsit to recover money paid by plaintiff, as defendant's security on his official bond as deputy marshal, the marshal is a competent witness for plaintiff, the money having been paid upon a compromise in full discharge of plaintiff's liability on said bond.
2. When an objection is made to an entire deposition as being incompetent evidence, the objection may be overruled, if any portion of the deposition is admissible.

ERROR to the Circuit Court of Autauga.

Tried before the Hon. A. B. MOORE.

ASSUMPSIT, by E. S. Dargan against A. C. Love.

GEO. W. GAYLE, for plaintiff in error:

1. The assignor of a chose in action, is an incompetent witness for the plaintiff. 2 Sup. U. S. Digest, 974, §§ 381, 382; Saltmarsh v. Smith, at January term, 1852; 8 Ala., 846.

2. Crawford is interested in the recovery, and therefore incompetent. If Dargan fails, Crawford is liable to him for money had and received; and the judgment in this case would be evidence in Dargan's favor. 8 Ala., 599; 9 ib., 744; 12 ib., 592.

S. P. STORRS, *contra:*

1. If the contract is broken, it is not necessary for plaintiff to stand a suit. It will be sufficient, if he prove a liability and payment. 13 Johns., 58; 4 ib., 460; 3 New Hamp., 270; 1 Pick., 118; 2 Greenleaf on Evidence, § 114. The disqualifying interest of the witness must be in the event of the cause itself. 1 Greenl. Ev., § 389. The true test of interest is, whether he will gain or lose by the result of this suit.

2. The objection was to the entire deposition, and therefore it should have been overruled.

CHILTON, J.—This was an action by the defendant in error against the plaintiff in error in the Circuit Court of Autauga, to recover money alleged to have been paid as his security, upon a liability as deputy marshal to one Robert L. Crawford, who was the marshal of the United States for the Southern District of the State of Alabama.

On the trial in the court below, Dargan offered the deposition of Mr. Crawford, the marshal, to prove that he paid to said marshal the sum of $1600 in discharge of his liability on Love's bond, and that the liability then actually existing, by reason of Love's failure to pay over certain moneys collected by him as deputy, amounted to $2200, or thereabout.

Crawford was objected to as interested in the result of this suit, but the objection was overruled, and his deposition allowed to be read as evidence. This is the only point presented for revision. The cases cited by the counsel for the

plaintiff in error show that, the assignor of a chose in action is an incompetent witness for the assignee. This is certainly correct. But we think it quite clear Dargan cannot be regarded in the light of an assignee of a chose in action. There is no pretence that Crawford practiced upon him any fraud, and he voluntarily paid a gross sum upon a compromise of his liability upon Love's bond. Now, whether the amount actually due from Love was more or less than the sum paid by Dargan, yet as he voluntarily paid it upon a compromise in consideration of a complete discharge, it is too clear to admit of any doubt that he has no recourse on Crawford. Consequently the latter is wholly unaffected by this judgment, and is a competent witness.

But if Crawford had been incompetent to prove Love's default, he was certainly competent to prove Dargan's payment to him; for this was against his interest, if he had any, and the objection going to the whole deposition, was for this reason properly overruled. As to Crawford's competency, see McNeill v. Sanford, 3 B. Monroe, 11; 6 Pick. Rep., 419; 10 Leigh's Rep., 155.

Let the judgment be affirmed.

DARGAN, C. J. being a party to the suit, did not sit in this case.

HURTER ET AL. *vs.* ROBBINS.

1. A decree *pro confesso* cannot be rendered against a defendant who has not been served with process.
2. A defendant against whom a decree *pro confesso* has been regularly rendered, has no right, except by consent or by leave of the court, to file an answer after the master has made his report upon a reference to him to take an account.

ERROR to the Chancery Court of Mobile.
Heard before the Hon. J. W. LESESNE.

HAMILTON, for plaintiff in error.
CAMPBELL, *contra.*

CHILTON, J.—This was a bill filed by the defendant in error against the plaintiffs to foreclose a mortgage alleged to have been executed by William Hurter, trustee of Eliza Horton, wife of Gustavus Horton. The trustee, the wife and her husband are all made parties. Process of subpœna issued on the 4th of March, 1851, and service was accepted by Eliza Horton on the 28th of the same month; but it does not appear to have been executed on any one else.

The defendants, Hurter and Eliza, answered on the 4th of April, 1851, averring that the mortgage debt belonged to one Thomas Belknap, administrator of John Butler, deceased, late of Hartford, Conn. This answer was replied to, and issue taken upon it in short by consent.

At a court of chancery, begun on the first Monday in April, 1851, a decree was rendered taking the bill for confessed against Gustavus Horton, for want of an answer; the decree reciting that he had been duly served with subpœna more than thirty days, and that he had failed to answer or demur to the bill. At the same term, a reference was made to the master to take an account of the amount due on the mortgage, and to report at that term; which having been done, the court, during that term, proceeded to render a final decree, confirming the master's report, which appears to have been made the 21st of April, 1851, and ordering the land to be sold, and the right of redemption of the defendants barred and foreclosed. It appears that on the 22d day of April, 1851, Gustavus Horton swore to the answer which had been previously filed by Hurter and Eliza Horton, and which purports to have been filed also for him.

There is no proof shown by the record of the mortgage, the notes which it purports to secure, or of the affirmative allegations of the answer.

This decree is clearly erroneous, and cannot be upheld.

The decree *pro confesso* was entered against Gustavus Horton, without any process of subpœna having been served upon him, and upon that decree the reference to the master was made. It does not appear that he had any notice of the proceedings until after the master's report was made; and indeed we are left to inference merely to ascertain whether he was notified before the day the final decree was rendered, as the

record fails to show on what day it was rendered. It is manifest, that the proceedings are based upon the answer of the trustee and the wife, and upon the contempt of the husband, who, if the decree *pro confesso* had been regular, had no right, but by consent, or the leave of the court, to file an answer after the report had been made, Davenport v. Bartlett, 9 Ala. 179; and the court might properly have disregarded it. See, as to whom decrees *pro confesso* may be rendered, Pitfield v. Gazzum, 2 Ala. 325.

As the case for this error must be sent back, it is unnecessary for us to say any thing as to the effect of the answer of the wife separate from her husband, without an order granting this leave. See, however, Dan. Ch. Pr. 193–549; 1 Eng. Ch. Rep. 164.

Nor will we enter into an investigation as to the merits of the case, to ascertain whether the lands of a married woman can be subjected to sale under a mortgage made by her trustee, to satisfy notes executed by her trustee, no allegation appearing that the debt was hers, or that she consented in any way to the mortgage. The question as to how far the estate of the married woman may be charged, was discussed in Bradford and wife v. Greenway et al., 17 Ala. 797, and Jones v. Dawson et al., 19 ib. 672; and reference to these cases will be sufficient to guide the future progress of the cause.

Decree reversed, and the cause remanded.

STAPLETON *vs.* STAPLETON.

1. A decree of the Court of Probate admitting a will to probate without notice to the testator's widow, is erroneous.

ERROR to the Court of Probate of Baldwin.

The last will and testament of John E. Stapleton, deceased, was admitted to probate on the 13th November, 1849, on the application of the executor, without notice to the widow. She afterwards filed her petition in the Court of Probate,

propounding her interest, and praying to be made a party to the record. The prayer of her petition was granted, and she now sues out a writ of error to reverse the decree of the Court of Probate.

The case was submitted, without argument.

JOHN T. TAYLOR, for plaintiff in error.
PERCY WALKER, *contra.*

CHILTON, J.—The decree of the Probate Court of Baldwin, allowing the will of John E. Stapleton to be proved and recorded without notice to the plaintiff in error, who is his widow, must be reversed. The case of Roy v. Segrist, 19 Ala. Rep., 810, is parallel with this; and it is only necessary for us to say, that we are satisfied with the correctness of that decision.

Decree reversed, and cause remanded.

DENT *vs.* PORTWOOD.

1. To show that a bill of sale to a slave is fraudulent, as being made to hinder and delay the vendor's creditors, a deed for land executed by him on the same day to the vendee, is admissible evidence, as tending to show that the vendor was disposing of his whole estate, and thus adding to the other proof of the *mala fides* of the bill of sale.
2. The payment of sixty-five dollars for a slave is a valuable consideration, and entitles the purchaser to the property as against one claiming under a voluntary fraudulent sale previously made.

ERROR to the Circuit Court of Fayette.
Tried before the Hon. WM. R. SMITH.

P. & J. L. MARTIN, for plaintiff in error.
E. W. PECK, *contra.*

CHILTON, J.—This was an action of detinue by Portwood against Dent, to recover a slave named Daniel.

It appears from a bill of exceptions sealed upon the trial, that the plaintiff proved, that said slave formerly belonged

to one Robert Oliver, who died in Texas; that upon the distribution of his estate by the administrator thereof, the slave in controversy was allotted to one Jefferson W. Oliver, a distributee of said estate, and by him sold to the plaintiff.

The defendant below proved, that said Robert Oliver, in his lifetime, executed to him a bill of sale for the slave in controversy, with other slaves, which were delivered with the bill of sale to him.

The plaintiff then offered proof tending to show, that the bill of sale was made by Oliver to defraud creditors; and, as tending to strengthen this position, he offered a deed for land executed at the same time the bill of sale was made by Oliver to Dent. This deed was objected to, but allowed be read.

The plaintiff (Portwood) offered evidence to show, that he had exchanged certain slaves which he had received as a distributee of said Oliver's estate, but which were embraced in Dent's bill of sale, for the slave in suit, and that he also paid in cash the sum of sixty-five dollars.

The court charged, that, if Dent's bill of sale was intended to delay, hinder, and defraud creditors, then the payment of the sixty-five dollars would constitute the plaintiff a *bona fide* purchaser for a valuable consideration, and entitle him to recover.

The admission of the deed and this charge are here assigned for error.

The deed for the land made at the same time between the same parties, we cannot say was irrelevant, as we can readily see how it might add to the proof of *mala fides* in the execution of the bill of sale for the slaves, as showing that the grantor was in fact disposing of his entire estate.

As to the charge, it was clearly free from error. The sixty-five dollars paid was a valuable consideration, and entitled the purchaser to the property as against a voluntary fraudulent sale previously made. No question was made, nor any proof offered to show, that Portwood's purchase was fraudulent. So that the charge was no invasion of the province of the jury. The only question was, whether the sixty-five dollars constituted Portwood a *bona fide* purchaser for value; whether, in other words, he was to be considered as a volunteer. The court properly held that he was not.

Let the judgment be affirmed.

ATWOOD'S HEIRS *vs.* BECK, ADMR.*

1. It is at least very questionable, whether slavery, as it exists among us, was not at one period recognized in England by the common law.
2. Slaves are now regarded by our law as chattels, and their owners have an absolute, unqualified property in them; and although this right may not have been recognized by the ancient common law, yet such is the genius and expansive nature of the common law, that it adapts itself to the necessities and exigencies of society, and when a new species of property is introduced, and the statute law is silent as to the rules by which it is to be governed, the rules of the common law are applied to it, modified, of course, according to the nature of the property.
3. As between master and slave, aside from all statutory prohibition, the right of manumission exists, and is deducible not only from the absolute ownership of the master in his slave as a chattel, but from analogous rules applicable to slavery as it has obtained in every civilized country.
4. The constitutional provision respecting the emancipation of slaves, and the several statutes in relation thereto, amount to a prohibition of the right of emancipation in this State, except in the mode pointed out by statute.
5. Questions of State policy can only be determined by the courts, from the provisions of the Constitution and the acts of the Legislature.
6. There is no restriction or prohibition, in the Constitution, the statutes or the decisions of this State, upon the power of the owner to remove his slaves to a non-slaveholding State, by himself, his agent or his personal representative.
7. A bequest to certain slaves was as follows: "To each and all of the beforementioned children I give and bequeath the sum of $8000 each, to be appropriated and invested in such manner as hereafter described, the same being invested in the hands of my executors, for the special benefit of the said children as aforesaid; and the bondage and slavery to which said children, by the laws of the State, are subjected, I hereby invest in the hands of my executors, for the purpose of my said executors removing said children, viz: (naming them) to a free State; the others, to-wit: (naming them) being already in a free State, from which they are not to be removed into any slave State; it being my desire to give to each and all of the children before-named their freedom, as also the sum of $8000, to be invested as hereinafter named," viz: one-half in lands in Indiana, Illinois or Michigan, and the other half to be loaned out on good individual security, additionally secured by mortgage on real estate; the titles to said lands, and the bonds for said moneys, to be delivered to the said legatees, when they shall have been removed to a non-slaveholding State. *Held:*

   That the legacies and trusts were valid, as to all the negroes; and that the Court of Chancery will not interfere, at the suit of the testator's residuary legatee, to prevent the trustee from carrying out the lawful desire of the testator.

* This case and all the following cases in this volume were submitted at the June term, 1852, but the opinions were not pronounced until after the resignation of DARGAN, C. J. REPORTER.

8. Land warrants, granted under the acts of Congress, unless specifically devised, pass to the heirs at law.
9. Only such real estate as is owned by the testator at the time of the execution of his will passes under it.

ERROR to the Chancery Court of Wilcox.
Heard before the Hon. J. W. LESESNE.

This was a bill filed by the heirs of Henry S. Atwood, alleging that, on the third day of August, 1843, said Atwood executed his last will and testament, a copy of which is attached to the bill, whereby he made certain bequests and dispositions of all property owned by him at the date of said will; that he appointed James Cootes and Jonathan Hagle his executors, and in the event of their death or refusal to act, he appointed Timothy W. Matthews and Robert Hall; that said Atwood departed this life in September, 1851, possessed of an estate consisting of choses in action and personal and real estate, estimated in value at the sum of three or four hundred thousand dollars; that said will was admitted to probate in Wilcox county, in which county said Atwood resided next before his death, on the 14th day of October, 1851; that the executors named refused to qualify, and Calvin C. Sellers and Franklin K. Beck were appointed administrators, with the will annexed; that complainants resided in Wisconsin, and did not assert their right as next of kin; that the administrators, having entered into bond and duly qualified, proceeded to obtain an order from the Probate Court for a sale of the cotton crop on hand, amounting to some eight hundred bales, and also all the perishable property of every description, on a credit of twelve months; also an order for the sale of one hundred of the slaves for cash, and one hundred and seventy-five more on a credit of twelve months, at public auction; that said property has been sold under said order, and the proceeds of the sale, less the sums which the administrators may have paid towards discharging the debts of the deceased, are now in their hands; that the sum thus left in the hands of the administrators after paying all the just debts of the deceased, amounts to one hundred thousand dollars or more, besides certain land warrants charged to be of great value. Complainants charge that this

money, with the land warrants, is subject to distribution among the children of Sally C. Northrop, who are the legatees of the *residuum* of the estate of said Atwood, and they pray that the same may be so distributed.

The bill further charges, that the real property owned by said testator at the date of the will, and the personal property then owned or since acquired by him, are charged with the payment of his just debts and vested legacies, if any; and that the real property acquired by the testator subsequent to the date of the will, vested in his heirs at law, who are Sally C. Northrop and Hannah M. Worster, and they pray the court so to decree; that according to one of the provisions of the will of said Atwood, certain slaves therein named were left in trust, "coupled with conditions, limitations and restrictions, contained and particularly set forth in said will, to be manumitted and set free from bondage, and a legacy of eight thousand dollars paid to each, to be invested for their benefit in the manner set forth in said will."

The complainants charge that, "they are willing and anxious to carry into effect all the provisions of the will of said Henry S. Atwood, so far as it can be done in conformity with the laws of Alabama, and as shall appear to the court, on final hearing of the cause, to be most consonant to equity and good conscience. But they charge, on information and belief, that the bequests in favor of said slaves, as well as the legacies directed to be invested for their benefit in the manner pointed out by the will, are absolutely void, and if this be so, they pray that the said legacies be declared void, and that the slaves be distributed among those entitled to the same; that if the bequests relating to the manumission of the slaves, and the investing of eight thousand dollars for each of them, be declared valid by the court, the complainants, Harson Northrop, Marshall A. Northrop and Sally C. Northrop, pray they may be appointed the guardians and trustees of said slaves, upon such terms and conditions and with such instructions as the court may prescribe; and they urge, as reasons for this application: first, the trustees to whom the power of manumission was given by the testator have declined to act; second, that the applicants are residents of a free State, and could carry the slaves and settle them in

the State of their residence at less expense than any one else; thirdly, they would feel bound, by the ties of blood as well as those of justice and humanity, to carry into full and complete execution what was the intention of said Atwood, deceased, who took two of said slaves, Alexander and Anny, to the State of Ohio in his lifetime; that one of said slaves, Cebille, has died, since the date of the will, and that those now remaining in Alabama are John, Sidney, William and Daniel, and that they have been hired by said Harson and Marshall A. Northrop to remain in their possession until a decision of the Chancery Court can be had."

Complainants "also pray a decree in relation to the other slaves intended to be emancipated by said Atwood, and the legacies left to them; and that the court will pronounce a decree as to each of the trusts contained in said will, and make all necessary orders in relation to them."

The bill prays a discovery from the administrators as to the lands, muniments of title thereto; also the personal property, and that they furnish an account of all the effects which have come to their knowledge or possession, and that said estate be fully administered in said Court of Chancery; that the trusts and limitations connected with the bequests and legacies to Sally C. Northrop and her children, be declared void, and that the legacies to each of them be paid in money, and that guardians for such as are infants be appointed to protect their rights.

The bill concludes with a prayer for general directions with respect to the various trusts contained in the will, and for general relief.

The will of said Atwood contains the following provisions: "I give and bequeath to a mulatto boy named Alexander, aged about fifteen years, also to his sister, a mulatto girl aged about twelve years, named Ann, who are now residing in the State of Ohio, in charge of Lemuel Brown, near Aberdeen, in Adams county; also to their sister, named Cebille, aged about nine years, also to her brother, named Julius, aged about eight years, also to his brother, John, aged about five years, the three latter children being on my plantation, near Prairie Bluff, and all of the aforesaid children, namely, Alexander, Ann, Cebille, Julius and John, being children of a

negro woman belonging to me, and known by the name of Candis; I also give and bequeath to a mulatto boy, named William, aged about six years, and to his brother Daniel, aged less than one year, both being children of a slave of mine named Mary, who resides at my plantation at Chilachi, six miles from Prairie Bluff; to each and all of the before mentioned children, I give and bequeath the sum of eight thousand dollars each, to be appropriated and invested in such manner as hereafter described; the same being invested in the hands of my executors, hereinafter named, for the special benefit of the said children as aforesaid; and the bondage and slavery to which said children, by the laws of the State, are subjected, I hereby invest in the hands of my executors, as hereinafter named, for the purpose of my said executors removing said children as aforesaid, viz: Cebille, Julius, John, William and Daniel, to a free State; the other two, to-wit: Alexander and Ann, being already in a free State, from which they are not to be removed into any slave State, it being my desire to give to each and all of the children before named their freedom, as also the sum of eight thousand dollars each, to be invested as hereinafter named. I also will and bequeath to nine of my servants their freedom, and hereby invest in my said executors, as hereinafter named, the control and ownership of said negroes, so far as it may be necessary to remove the said slaves to a free State, which shall be done as soon as practicable, and at furthest in one year after the probate of this will. The said slaves whom I wish to be liberated and removed, as aforesaid, are Candis, a woman, aged about thirty-six, she being the mother of five of the children before mentioned, and her two black children, to-wit: Jesse, aged about eighteen years, and Lucy, her daughter, aged about fifteen years; also a man named Seaborn, aged about twenty-seven years, and four small children of his by a woman named Milly, to-wit: Lucy, Betsy, Nancy and Wyatt. To the aforesaid Candis, Seaborn and Mary I give and bequeath the sum of two thousand dollars each, to be invested in them, in part, say one half, in lands in one of the free States to which they may be removed, and the balance, say one thousand dollars each, of the aforesaid legacies, to be loaned out and well secured by bond and mort-

gage on real estate, to be located in the vicinity of where they may locate, the interest to be payable to them semi-annually. The expense of removing all the aforesaid persons to be borne by my estate, and the means furnished them for a six months' supply of provisions at the expense of my estate after they arrive there. All the personal effects they have in possession here, to be and belong unto them, and if they are not furnished with beds and clothing, to be so furnished from my effects before emigrating."

"I give and bequeath to my executors the sum of two thousand dollars, to be appropriated to the use and benefit of a boy child, some six or seven months old, the son of Emiline Warren, the use and appropriation of said money to be left entirely to their discretion, whether to give at all or not, and as circumstances may justify; no part of the sum being given for the use of any of the child's connections, in the event of the death of the child; nor to the child, unless it can, in the opinion of my executors, be usefully appropriated. The residue will remain as among the effects of my estate, to be appropriated as hereinafter named."

The testator then gives to his sister, Sally C. Northrop, the sum of five thousand dollars, and requires it to be invested in land, as soon as his estate is so settled as that it can be invested, or in such security as she may prefer, the use and benefit of the same to go to her annually, but not to be in the control of her husband; the principal to be preserved untouched, unless such circumstances of want should occur as, in the minds of his executors, should make it necessary to give to her use a portion of the principal; but in the event no such circumstances do occur, the principal to be preserved and secured for the mutual use, at her decease, of the heirs of her body.

He also creates a charge upon his estate of one hundred dollars annually, to be paid by his executors, to his stepmother, Mary Atwood, the same to be paid to her so long as she lives. Testator further requires, that the eight thousand dollars above named as given to each of the slaves, (naming them) being in all fifty-six thousand dollars, be invested in lands in Indiana, Illinois or Michigan, which can be entered at Government price, taking care to make the best selections, until

one half of said legacies respectively is invested, and the other half to be loaned out on good security of individuals, always taking care to have it additionally secured by mortgage upon real estate; the interest to be payable annually, which shall also be loaned out on bond and mortgage in like manner.

It is also provided by the will, that all the testator's property be sold at public sale on a credit of one, two, three and four years, in equal payments; that his land and negroes be sold on a credit of one year, provided the same can be done without injury to his estate or growing crop; that as soon as the nine slaves before mentioned shall be removed to a free State and provided for as previously stipulated, and the money invested in lands and secured as above directed, the titles for the said land, as well as the bonds for the money, are to be delivered to them, to-wit: Candis, Seaborn and Mary, to use and control to all intents and purposes as their own, and independent of the appropriation for them, which he desires should be done as soon as can be.

He desires the appropriation for the removal and support of the slaves to be manumitted to be among the first to be made, and the children of Candis to be well supported and provided for, and educated, until the investments are made for them, as provided in the will, when that charge can be transferred to their proper guardians, to be appointed for them in the State to which they may be removed.

The residue of his estate, after paying off his debts and liabilities, is given to the children of Sally C. Northrop, his sister, resident in the State of New York: half to be invested in lands in some of the new States, contiguous to the lands to be entered for the seven mulatto children above named, and the remainder to be loaned out on bond and mortgage, &c.

The testator further provides, as follows: "I do hereby invest in my executors full and complete power to remove the said persons, and that the title and ownership in the said persons be full and complete for so removing them, knowing full well they cannot be given their freedom to remain in this State." After appointing his executors, and providing for filling vacancies, and providing compensation for them, as also making such children as should be born of his sister,

Sally C. Northrop, before the distribution of his estate, equal participants in the residuum, the testator again declares that, "the before-mentioned children, namely, Alexander, Ann, Cebille, Julius, John, William and Daniel, I charge upon my executors to have properly and faithfully schooled for the term they may remain in their charge, and if it becomes necessary for them to extinguish their charge, after four years, to make such arrangements as will secure to them a good English education."

Franklin K. Beck, one of the administrators with the will annexed, answers the bill, and admits the execution and probate of the will as charged, the death of the testator, the refusal of the executors to qualify, the appointment of himself and Sellers as administrators with the will annexed, their sale of the cotton crops and a portion of the slaves, the amount of the sales, the supposed amount of indebtedness; admits that the funds received, and which have not been paid out, are in his hands and the personal representative of his co-administrator; admits that there are some sixty or seventy land warrants in his hands, purchased from soldiers who served in the late war with Mexico; that powers of attorney, many of which are incomplete, authorizing said Atwood to do what was necessary to render certificates of discharge which he purchased from said soldiers available, are in his possession, but that they are, perhaps, unavailing, as Atwood did not execute the power before his death; and said administrator prays the direction of the court, as to whether they are to be considered real or personal estate. He admits that much of said Atwood's lands was purchased since the date of his will; also admits the provision in the will requires the executors to remove and emancipate the slaves named, quoting the clauses in the will which refer to this subject; admits the death of Cebille, but denies that the bequests in the will, creating a trust for the slaves after they shall have been removed to a free State, or the requisition upon his executors to remove them, are void; on the contrary, he insists upon their validity, and that they may be carried out without violating either the law or the policy of the State of Alabama; also admits that the complainants are the heirs at law, as charged, of said testator.

The other administrator, Sellers, having died since the institution of the suit, it was ordered, that as to him the same should abate.

Upon the final hearing upon bill and answer, and agreement of the parties consenting to certain amendments to the bill and answer, putting more directly in issue the legality of the legacies and the liability of the slaves attempted to be manumitted to be administered on as property of the estate, and of the land acquired by the testator since the date of his will to pass under the will to the residuary legatees, as contended for by the administrator, or to the heirs at law, as insisted in their behalf, the Chancellor pronounced a decree substantially as follows:

First, That the trusts created in favor of slaves who are in this State, are void; that they cannot be emancipated in the manner pointed out in the will, without the consent of the parties interested in the estate; that, being slaves, they must be treated as such; that the legacies to them being void, fall into the residuum, and are to be paid to the residuary legatees;

Second, That the legacies to Alexander and Ann, the negroes in the State of Ohio, are valid, said negroes being free;

Third, That the land warrants are to be regarded and treated as real estate, and do not pass under the will, but descend to the heirs at law;

Fourth, That, in like manner, the land acquired subsequently to the date of the will, does not pass under it, but descends to the heirs at law as though the testator had died intestate; and the administrator was directed to administer the estate accordingly.

Both the complainants and the defendants are dissatisfied with the decree, and assign errors in this court. The complainants in the court below here insist, that the Chancellor erred:

1. In deciding that Alexander and Ann, who are in the State of Ohio, are free;

2. In holding that the legacies of $8000 to each of them were valid;

3. In not decreeing upon the various trusts put in issue by the pleadings;

4. In decreeing upon points not put in issue by the pleadings.

On the other hand, the administrator assigns for error:

1. That the court decreed the legacies to the slaves in this State were void, and that the trusts of the will respecting them could not be carried out;

2. In holding that the land warrants should be treated as land, and that they descended to the heirs at law;

3. That the land acquired after the date of the will should descend in like manner.

ELMORE & YANCEY and A. P. BAGBY, for plaintiff's in error:

I. If the will creates a trust in the executors to remove the negroes to another State and there free them, the trust is unlawful. It is not true, that an individual may do as he pleases with his property during life, and by will delegate to another the same right after his death. The right of disposition by the owner during life may be somewhat regarded as a natural right, incident to its acquisition and enjoyment; but this right is regulated by law. The right of disposition after death is the creature of society, and of law, and must be exercised conformably thereto. A man may burn up his property, or may sell it and cast the proceeds into the sea, but a will directing his executors to do these things would scarcely be held good and valid. Atwood might have sold all his estate, and taken the proceeds to New York, or any other free state, and there established a press for the printing and distribution among our slaves of incendiary publications to excite them to insurrection; but if he had bequeathed his estate to executors or trustees, for the purpose of such an establishment, our courts would certainly declare it void, as being against the policy of the State. The true question is, not to what extent this policy is contravened, but whether it is contravened at all.

It cannot be said, that the right to manumit slaves existed at common law; for slavery, as it exists here, was unknown to the common law. Villeins could be manumitted; but they had a *status*, possessed civil rights, and were free as to all the world but their lord. He had no property in them, but only

a right to their services, and these he could release by deed, or by certain other acts in his lifetime; but he could not release them by will, because, on his death, they descended at once to his heir along with the land. Villeins had a capacity to take, because they were persons, and not property.

Trusts are regarded in equity in the same manner as the title is at law, and must vest in some one capable of taking; and must be of such a nature that they can be enforced, and in favor of some one who can enforce them. And legacies, whether direct or in trust, must vest at the death of the testator; or they may take effect at a future day, if the time be fixed; otherwise, they are void for uncertainty. 3 Peters 467.

Although the trusts are to be consummated in a State where they are legal, yet the courts of the State where they are created, and where their execution is commenced, must, of necessity, when called on, pronounce on their validity; and where the laws or policy of that state are contravened in any respect, they must declare the trusts void. "The law will not permit itself to be overruled by any device, however cunning, nor by any circuity, however remote." If the trusts for the removal and manumission of these slaves are valid, they derive their validity from a will executed in this State, by a person domiciled here, in relation to property in this State, all of which, testator, will and property, are subject to our laws. If these slaves are entitled to their freedom under this will, the right is vested in them by the laws of this State. 1 Rand. 234; 6 ib. 563. Slaves, then, may be freed by will, not by a direct bequest to that effect, but by a naked trust to others to free them, or to remove them elsewhere and emancipate them. If this can be done by such a trust, it is difficult to see why it cannot be done directly, upon condition that they should leave this State in a certain time.

To sustain the validity of these trusts, the court must determine that our policy is in favor of manumission; or, that we have no policy at all on the subject, provided they are removed from the State. This question is settled by the case of Trotter v. Blocker, 6 Porter 269, where it is held, that the constitution and laws of this State declare a distinct policy, which is not only against the increase of free negroes, but against the emancipation of slaves. The reasoning of the

court in that case is fully sustained by the cases referred to in Virginia, North Carolina and South Carolina, Hinds v Brazeale, 2 Howard (Miss.) 837; Frazier v. Frazier, 2 Hill's So. Ca. 304; also, 7 Ala. 796; 9 ib. 475; 13 ib. 102.

The principles of the decision in the case of Ross & Ross v. Vertner, 5 Howard, (Miss.) 305, are not in conflict with those of Trotter v. Blocker. The former can only be sustained, on the ground that the policy of Mississippi is in favor of emancipation, provided the slaves are sent out of the State; and this seems to be the controlling idea of Trotter, J., in that opinion. He entirely overlooks the clause giving to the slaves an election whether they shall be sent off or remain, and which was held, in Carroll & Wife v. Brumby, 13 Ala. 102, to invalidate the bequest, because they could not elect. In the case of Frazier v. Frazier, in South Carolina, Judge Harper did not sit, and does not appear to have concurred in the opinion. O'Neal, J., who delivered the opinion, is well understood in South Carolina to entertain peculiar opinions on this subject. He rests his opinion on the same ground with Judge Trotter. Since these decisions were made, a statute has been passed, both in Mississippi and South Carolina, to meet such cases, adopting the principles for which we contend, as laid down in Trotter v. Blocker. These acts cannot be said to make the policy of those States; they are simply declaratory of it, being rendered necessary by the decisions of their courts. 1 Richardson's Eq. R. 61.

II. But we insist, that this is not the true construction of the will. There is no pretence that the bequests of money to the slaves are valid, except as to the two already in Ohio. These legacies vest immediately on the testator's death; there is no future period fixed, at which the negroes are to take them. The legacies, whether direct to the negroes, or to the executors in trust, are given, and, by the terms of the will, vest on the testator's death, or not at all. If the intended beneficiaries take these legacies, they can only do so by virtue of a capacity conferred on them by the will, contemporaneously with the gift of the legacies, unless they previously had that capacity. They were slaves at the testator's death, and the will cannot confer on them the capacity to take under it. If freedom was not given, or intended to be given, to take

effect at the testator's death, the legacies of money fail, because of the incapacity to take as slaves.

The two children in Ohio are in the same condition with the others, as to capacity. They have never been emancipated; the fact that they are in a free State, does not make them free by our laws. If brought back to this State before the testator's death, they would have been his slaves. The will speaks of them as slaves, and treats them as such. The testator expresses his desire to give them their freedom. He has never abandoned his control over them; Brown must be regarded as his agent. Originally slaves, and no act of manumission being shown in their favor, they continue slaves, and the legacies of money to them fail.

Every part of a will may be looked to, to ascertain the testator's intention. Transpositions may also be made; but omissions cannot be supplied, nor can passages having meaning be left out of consideration. When various persons are the beneficiaries of the will, and the bequests are of similar character, it will be held that the testator intended to bestow them all in the same manner, and at the same time, unless a contrary intention appears; and when one only of such bequests has certainty, as to time or manner, the others will be referred to it, to determine their qualities. In this case, all the bequests of money to the negroes were intended to be put on the same footing, and all the bequests of freedom on the same footing: all were to vest at the same time with each other. The will does not fix a period at which they are to vest; but the law says, that they vest at the death of the testator, or not at all; and as the legatees are incapable of taking at that time, both legacies fail. The clauses bequeathing freedom and money, standing alone, would make the bequest of freedom void, and such it must remain, unless controlled by some subsequent clause. The subsequent clauses which are relied on, as having this effect, invest the executors with the bondage, control and ownership of the slaves, "so far as it may be necessary to remove them to a free State; the testator "knowing full well, they cannot be given their freedom, to remain in this State."

Now, here is a trust which is said not to be against the law or policy of the State, and although the slaves could not en-

force it, yet the courts will leave it to the conscience of the trustees. A short answer to this is, all trusts are void which cannot be enforced, at the instance of the party in whose favor they are created; and as the executors are naked trustees, they hold for the next of kin. Moreover, if this is a trust, it is for a specified and limited purpose, viz: to remove them to a free State. Why did not the testator add, "and for the further purpose of emancipating them when removed?" The reason is obvious, from a reference to the preceding clauses; because he had already given them their freedom. It is the same as if the testator had said: "I hereby give them their freedom, and, that they may enjoy that gift, I charge upon my executors the duty of removing them to a free State; and to enable them to do so, I bequeath to them the ownership and control of said negroes, for that purpose and for that alone." This is further evident, from his making the expenses of their removal a charge upon his estate; which is a trust vesting in this State, for their benefit, at his death, if at all.

This construction of the will is sustained by the case of Trotter v. Blocker, *supra*. The only difference between the two bequests, is this: in that case, there was a direct bequest of freedom; in this, it is to trustees for the same purpose.

III. The land warrants were properly considered land, and descended to the heirs at law. They cannot be distinguished, in this respect, from bonds for title to land.

F. K. Beck, *contra, pro se:*

The owner of property has the absolute control and dominion over it, and this dominion he can relinquish at pleasure; the manner of relinquishment, in the absence of legal restraints, is left entirely to his discretion. The right to dispose of property by will, is co-extensive with the owner's right of disposal while living. 4 Wheaton's R., 35; 1 Freeman's Ch. R., 587; 2 Hill's Ch. R., 305. A slaveholder may, in virtue of his right of property, remove his slaves beyond the limits of this State, to any other quarter of the world, even though their emancipation be his avowed object; and this power he may transmit to his executor, by testamentary disposition, as amply and fully as he enjoyed it himself. Frazier v. Frazier, 2 Hill's Ch. R., 305; Ross &

Ross v. Vertner, 1 Freeman's Ch. R., 587; 5 Howard, (Miss.) 305; McCutcheon v. Marshall, 8 Peters, 285; 2 Call, 319; 5 ib., 311; Elder v. Elder, 4 Leigh's R., 252; 6 Sm. & Mar., 93; 7 ib., 663; 4 Georgia R., 445.

The question before the court is a question of removal, and not of emancipation. The will does not direct the executors to emancipate the slaves, but to remove them to a free State, that they may acquire freedom by the silent operation of the laws of that State. But if they thus become free, it is a matter with which the laws of Alabama have no concern. The laws of Alabama do not prohibit the right of emancipation; they only qualify the right, when about to be exercised within the State. Their object is, to prevent the increase of free negroes within the State. The policy of Alabama is opposed to the increase, rather than the decrease of her black population. The bequests, then, to trustees are good, being opposed to neither the policy nor the laws of this State; and the devises for the benefit of the slaves are also good, and will vest when the precedent condition, their removal to a free State, is performed. Then they acquire a capacity to take. 2 Hill's Ch. R., 317; 2 Call, 270, 298. A conditional devise of freedom to a slave is good, when there is a precedent valid trust raised to support it. Pleasants v. Pleasants, 2 Call, 319; Williams v. Ash, 1 Howard's U. S. R., 1. A testator may devise his property on what trust or condition he pleases, so that it be not against law. 5 Wheat., 35. In construing a will, the court will, if possible, give effect to the testator's intention; and for that purpose, will transpose words and even sentences. 2 Hill's Ch. R., 316. The evident intention of the testator, Atwood, was, to give these slaves, and the legacies intended for them, to his executors, in trust that they might remove the slaves to a free State, where they might become free and capable of taking their legacies. Their removal was a condition precedent to the vesting of the legacies. As to their capacity so to take, see 6 Sm. & Mar., 93; 7 ib., 663; 1 Howard's U. S. R., 1; 1 Richardson, 80.

The two legatees who were in Ohio at the time of making the will, and have been there ever since, are free, and of course entitled to their legacies. Slavery exists only by virtue of the laws of the States where it is sanctioned. If a

slave escapes to a free State, he is free, according to the principles of the common law; and his re-caption is authorized only by the constitution and laws of Congress. 2 McLean's R., 596. If the owner of a slave voluntarily takes him to a free State, the slave becomes free, and the owner cannot restrain him of his liberty, whilst there, nor carry him away without his consent. 1 Wash. C. C. R., 499; 12 Conn., 38; 18 Pick., 193; 10 B. Monroe, 545; 2 Marsh., 467; 3 Monroe, 270; 4 Mis., 592; 3 McLean, 350; 9 Gill & J., 19. In the case at bar, the testator, previous to 1843, took these two persons to Ohio, and left them there for about ten years, with the avowed object, as declared in his will, of giving them their freedom.

CHILTON, C. J.—The prominent questions presented by the record before us, as brought to view by the cross assignments of error, may be thus stated:

1. Are the provisions in the will of Henry S. Atwood, which vest the bondage, title and ownership of the slaves therein named in his executors, for the purpose of their being taken to a free State so as to remain free, and directing certain sums to be invested in lands, and other sums to be loaned out, for their benefit, valid bequests according to the laws and policy of this State?

2. Are the legacies to the two negroes residing in the State of Ohio, Alexander and Ann, legal and valid?

3. Are the land warrants owned by the testator to be regarded as real or personal estate in a court of equity?

4. Do the lands acquired by the testator between the date of his will and the period of his death pass under the will, or go to the heirs at law?

The counsel have confined their argument to the two inquiries first propounded, and as they alone involve any difficulty, we propose making them the chief subject matter of discussion in this opinion.

The objections to the validity of the trusts created by the will in favor of the negroes, may be thus stated: 1. That the bequests are in violation of the laws of this State; 2. That they are opposed to its settled policy as declared by several adjudications of this court; 3. That they are illegal and

void, because the legacies do not vest upon the death of the testator, nor at any fixed future period; and 4. Because the court cannot execute the trusts, and the executors holding by a trust which cannot be enforced, it is insisted, should be considered as holding in trust for the next of kin of the testator.

The first, and main inquiry is, are the bequests in violation of any law of the land? It is argued, in opposition to them, that the right which a master has to manumit his slaves must be conferred by statute, or it does not exist, inasmuch as the institution of slavery, as it obtains with us, was unknown at the common law, and, as a consequence, the right of manumission, or of enfranchizing them, was unknown.

It has generally been conceded (and I have several times admitted it) that slavery, as it here exists, was unknown to the common law; but upon an examination of the subject, I am strongly inclined to think there was a time in England, when negroes, or heathens and infidels, were regarded as the subjects of property. This may be fairly inferred from British diplomacy and British legislation, as well as from elementary writers and several adjudications. In proof of this, I need only refer to the treaty of Assiento, concluded on the 26th of March, 1713, between the kingdoms of Spain and Great Britain, whereby the latter secured to the British South Sea Company the privilege of furnishing 4,800 slaves to the Spanish colonies in America, annually, for thirty years; to the statute of 5 Geo. II, c. 7, § 4, which declares that negro slaves in America shall be liable to all simple contract debts as well as specialties; to the 32nd Geo. II, c. 31, in the preamble to which it is recited, that the trade to Africa is advantageous to Great Britain, and necessary in supplying its colonies with negro slaves. According to Swinburn, p. 84, 6th Ed., there was a species of slavery in England distinct from villenage; and the author of the Mirror intimates that it was lawful to hold infidel slaves. Mir. c. 2, § 28. Mr. Justice Blackstone (though not altogether consistent with previous declarations of his own) says: "Whatever service the heathen negro owed to his American master by general, not by local law, the same (whatever it may be) is he bound to render when brought to England and made a christian." He also

says: "With regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before; for this is no more than the same state of subjection for life which every apprentice submits to for the space of seven years, or sometimes for a longer time." 1 Bl. Com. 423.

In Butts v. Penny, 2 Lev. 201, decided in 29th Chas. II, and which was an action of trover for 200 slaves, (or as another report states, for 10 slaves, 20 Str. 51,) the jury found a special verdict, namely: that the negroes were infidels, subject to an infidel prince, and usually bought and sold in India as merchandize, by the custom amongst merchants, and that the plaintiff had bought them and was in the possession of them, and that the defendant took them out of his possession. The court held, that negroes being usually bought and sold amongst merchants in India, and being infidels, there might be a property in them sufficient to maintain the action. Judgment *nisi* was accordingly rendered for the plaintiff, and on the prayer of the defendant's counsel to be further heard, leave was granted until the next term. It does not appear what was finally done in the case.

But in Gelly v. Cleve, decided by the Common Pleas in the 5th of Will. & Mary, and reported in 1 Ld. Raymond's Rep. p. 147, it was adjudged "that trover would lie for a negro boy, for they were heathens; and therefore a man may have property in them, and that the court without averment made, would take notice that they were heathens."

So also, in the singular case of Sir Thomas Grantham, reported in 3 Modern Rep. 120, Sir Thomas, as the report goes, "bought a monster in the Indies, which was a man of that country, which had the perfect shape of a child growing out of his breast as an excrescency, all but the head, and brought him to England and exposed him to the sight of the people for profit. The Indian turned christian and was baptized, and was detained from his master, who brought *homine replegiando* for his recovery. The sheriff returned that he had replevied the body, but did not say the body in which Sir Thomas claimed a property; whereupon the sheriff was ordered to amend his return," &c.

Indeed, it was not until the decision of the case of James

Somersett in 1771–2 by the King's Bench, which called forth the great argument of Mr. Hargrave, that this question appears to have been fully settled in England, at which time, the policy of England in respect to slavery and the slave trade, as well as to villenage, had undergone a change. See 20 State Trials, London Ed. pp. 1 to 81.

Without, however, going further into the old cases, those which I have cited may suffice to show, that it is at least very questionable whether at one period slavery, as it exists among us, was not recognized by the common law. But be this as it may, it is most unquestionably true, that slaves are now regarded by our law as chattels, and the owners thereof have an absolute unqualified property in them; and although such right might not have been recognized by the ancient common law, yet such is the genius and expansive nature of the common law, that it adapts itself to the necessities and exigencies of society, and when a new species of property is introduced, and the statute law is silent as to the rules by which it is to be governed, the common law embraces it, and its rules are applied to it, modified, of course, according to the nature of the property thus subjected to its governance. Navigation and transportation by steam were unknown to our common law ancestors; but no one will contend that, for this reason, the rules of the common law, which are adapted and suited to the nature of such improvements, do not apply. On the contrary, we have daily recurrence to the principles of the common law, to guide us in defining the rights and prescribing the duties of persons in reference to new inventions and improvements, which would otherwise be left to the arbitrary discretion of the judge.

The master, having an unqualified property in his slaves, may dispose of them in any way he pleases, unless restrained by some rule of law, or fixed and settled policy of the State. The *jus disponendi*, or right of disposing of his property, is an inseparable incident to its absolute and unqualified ownership. This general power which the master has over the slave, both in respect to his treatment and manumission, has been controlled and guarded by legislative checks, prompted alike by humanity for the slave and security for the State. In considering the rules which apply to, and regulate this pe-

culiar species of property, we must look upon them in the double capacity of chattels and intelligent beings. Considered in this latter capacity, our law, pervaded as it is by the spirit of christianity, and founded on principles of humanity and benevolence, throws around them its protection. This protection is not only secured by the fundamental law, the Constitution of the State, (Art. vi. §§ 2 and 3,) but many statutes have been enacted to secure the same end. The law punishes an assault or battery upon them by any third person, Digest, 545, § 41; prohibits the master, or any one by his permission or authority, from inflicting cruel or unusual punishment upon them, (ib. 431, § 1); secures to them, in trials for offences above petit larceny, the right of trial by jury, (ib. 474, § 18), and provides them counsel in certain cases at the public expense, (ib. 473, § 13); and the master is bound both morally and legally to supply the slave's necessary wants, and he may not avoid this liability by voluntarily putting the slave away from him, without providing some one to occupy the relation of master to him. 4 Ala. 66. Subject to these, and other restrictions which we shall presently notice, the right of the master to his slaves is the same with his right to any other chattel. He may sell and dispose of them without writing; may convey, or bequeath them by his last will and testament, absolutely or in trust, precisely as other personal property; and but for the inhibition created by the statute laws, he might at pleasure renounce his property in them by manumission. If the written law was silent upon the right of emancipation, and no consideration of public policy was fairly deducible from it, what law would forbid the exercise of this right? Certainly not the common law; for the counsel yield this, when they contend that the institution was unknown to that law; but if it were recognized by it, the same right which the lord had to enfranchize his villein would doubtless be awarded the master in respect of his slave. This right, by the ancient English law, the lord exercised at pleasure, by delivering the villein to the sheriff and publicly proclaiming him exempt from the bond of servitude by manumission; then showing him open gates and ways, and delivering him a lance and a sword, he became a free man, Crabb's His. of Eng. Law, 82;

but after writing became common, they were manumitted or enfranchized by deed.

But, if it is said the institution of slavery, as it exists here, is more analogous to that which obtained among the Romans, and that we should seek for analogies in the civil law, we reply, that the master, according to that law, could liberate his slaves at pleasure. Justinian's Inst. Tit. *Quibus modis manumittatur*, § 1.

In McCutchen et al. v. Marshall et al., 8 Peter's Rep. 220, it was said with respect to the right of the owners of slaves to emancipate them: "As a general proposition, it would seem a little extraordinary to contend, that the owner of property is not at liberty to renounce his right to it, either absolutely or in any modified manner he may think proper. As between the owner and his slave, it would require the most explicit prohibition by law to restrain this right." It was said, that "considerations of policy, with respect to this species of property, may justify legislative regulation as to the guards and checks under which such manumission shall take place, especially so as to provide against the public's becoming chargeable for the maintenance of slaves so manumitted." See, also, Furguson et al. v. Sarah, 4 J. J. Marshall's Rep. 103, and cases collated in Wheeler's Law of Slavery, pp. 279 to 388.

We are, therefore, of opinion, that as between the master and his slave, aside from all statutory prohibition, the right of manumission does exist, and is deducible not only from the absolute ownership of the master in the slave as a chattel, but from analogous rules applicable to slavery as it has obtained in every civilized country, as far as our researches extend, and as sustained by numerous adjudications of our own country.

Let us next turn to the laws of our State, and see how far this right has been restricted.

The first act passed upon the subject, was in 1805, by the legislative council of the Mississippi Territory, entitled "An act to prevent the liberation of slaves only in cases hereinafter named, and for other purposes." The act provides, that from and after its passage, "it shall not be lawful for any person or persons, holding or owning slaves, to liberate them,

or any of them, unless they first prove to the satisfaction of the General Assembly, that such slave or slaves have done some meritorious act, either for the benefit of said owner, or for the benefit of this Territory;" and provides, that in such case the owner enter into bond and security against such slaves' becoming a charge upon the Territory; and provided, also, that such slaves should be liable to the existing debts of the party emancipating them. Nothing was said in this act respecting their removal without the limits of the Territory.

Thus the law, in respect to emancipation, stood for many years. Divers applications were made under it to the legislature, by the owners of slaves, for their emancipation. At first, they were granted without inserting their removal from the State as a condition, but the increase of free negroes doubtless suggested this provision as necessary, and we find it was generally added after the Constitution was adopted. From February, 1818, until December, 1822, there were some fifty slaves liberated by the legislative authority; and these frequent applications becoming inconvenient, it was deemed proper to vest the power in the judge of the County Court, which was done by statute in 1834.

By the sixth article of the State Constitution, title "Slaves," § 1, it is declared, that "the legislature shall have power to permit the owner of slaves to emancipate them, saving the rights of creditors, and preventing them from becoming a public charge."

By the act of 1834, it is declared, that "whenever the owner or owners of any slave or slaves, shall be desirous of emancipating such slave or slaves, such owner or owners shall make publication in some newspaper printed in the county where such slave or slaves reside, (or, if there be no paper printed in said county, then in the nearest paper thereto,) for at least sixty days previous to the making of the application; in which shall be set forth the time and place that such application will be made, together with the names and description of the slave or slaves sought to be emancipated; and at the time appointed, the judge of the said County Court may, upon petition filed, proceed to hear and determine upon the application so made; and if, in his opinion, said slaves should be emancipated, in consideration of long, faithful and meri-

torious services performed, or for other good and sufficient cause shown, said judge may proceed to emancipate and set free such slave or slaves; and the clerk of the said court shall make record of the same in a book to be kept for that purpose: *Provided*, That such slave or slaves shall remove without the limits of this State within twelve months after such emancipation, never more to return, and that such emancipation shall not take effect until after such removal." Clay's Dig. 545, § 37.

The constitutional provision, as well as the acts above referred to, may be regarded, (and indeed it has been so decided,) as a prohibition against the emancipation of slaves in this State, except in the mode pointed out. This question came before this court in the case of Trotter, Adm'r, v. Blocker and wife et al. 6 Por. 269, which was a bill filed by the administrator *cum testamento annexo* of William Butler, deceased, asking directions in reference to certain trusts created by the will. The bequest of freedom to certain slaves was as follows: "It is my will and desire, after my death, that all and every one of my negro slaves be free and emancipated, they and their heirs, forever. I give and bequeath unto my said negroes all my plantation utensils and my kitchen furniture, and give them one year's clothing and one year's provision out of my estate; and should the laws of my State be such, that the said negroes cannot remain in the limits of the State free, I give and bequeath the sum of one hundred dollars to the said negroes, to remove them to some other State in the Union." And the court very properly held, that the bequest of freedom to the slaves was void, as it was to take effect in this State, and the slaves were made the legatees of their own freedom, and as slaves, they were incapable of taking. The marked difference between the bequest above copied and those under consideration in the will of Atwood, is this: In Butler's will, the slaves were declared free in this State, and provision was made, if they could not remain in this State in that condition, for their removal; while, in the will before us, the slaves are to continue such in this State, and the executors are their owners, but for the purpose of taking them to a free State, where they may enjoy their freedom. In the case of Butler's will, the bequest of freedom to

the slaves was void, because the *cestuis que trust* were incapable of taking, and being void, the rights of the next of kin immediately attached upon the death of the testator; but in this case, an executory trust is created by the will, not to vest in slaves, but in free persons—not to vest in this State and work the freedom of the slaves here, but to vest in them after they shall have been removed. The question, then, resolves itself into this: May the personal representative of the testator, in obedience to his last will, remove the slaves to another State by the laws of which they become free? It is conceded that the testator might lawfully have done this, and in our opinion, this concedes the whole case; for if the policy of the law be opposed to every form of emancipation, and no slave can be emancipated but according to the mode pointed out, and it be true that this will is but a device to avoid the statute, by effecting the emancipation of the slaves through their removal to a free State, it would seem to follow, that if the testator, instead of appointing another to execute his will, had himself effected his desire while living, by a removal of these slaves, and the investment of moneys for them, he would have been guilty of a violation of the laws of the State. It cannot for a moment be questioned, but that Atwood, while living, could have made the same disposition of his property which he directs his executors to make. He might have removed the slaves in person, or by his agent, and there is no law forbidding it. Who is the executor? He is but the representative of the testator, and is influenced by his will to do what he desires, if such desires be lawful: the means of rendering the testator's will effectual. The testator, as respects the execution of his lawful desires as to the disposition of his property, and which he has expressed in due form, still lives in the executor in legal contemplation. Powell on Devises, 150.

In Alston v. Coleman, 7 Ala. 795, the testator bequeathed a slave to his wife for life, and at the death of his wife, said slave to be set free; and he gave to the use of said slave $1500, to be used subject to the discretion of his executors. The court were first inclined to the opinion, that the bequest was good, and fell within the principle of the decision of Pleasants v. Pleasants, 2 Call 270, which was a bequest to liberate the slaves in future and at a given period, provided the laws of

the State should at that time allow them to be freed. But, as the will did not refer the bequest of freedom to a future time, so as to take effect or be defeated, according as the law might then warrant or forbid it, the court was of opinion that it must be construed with reference to the laws of the State existing at the time of the testator's death, and by this law the bequest of freedom being void, the trust dependent on it fell to the ground. The argument of the learned judge who delivered the opinion in this case, and the reference made, with apparent approval, to the case of Pleasants v. Pleasants, is quite persuasive to show that the court was of the opinion, that, notwithstanding there was no person at the death of the testator capable of taking the bequest, yet, if it was given to take effect at a future period, when the party for whose benefit it was created might be capable of taking, the trust would be supported.

The trust in the will before us, as we shall hereafter endeavor to show, is not for the manumission of the slaves in this State. The testator was apprised that this could not be done; but, being desirous of giving the slaves their freedom and making provision for them, he wills them to the executors, to be taken where they may enjoy freedom as well as the provision made for them. Such was unquestionably his intention.

The case of Carroll and wife v. Brumby, 12 Ala. 102, merely decides, that when the removal of slaves to a place where they may enjoy their freedom depends upon their election, the bequest is void for want of their capacity to elect.

It is very clear that none of the decisions of this court come up to the question now involved, and the statute law refers merely to the emancipation in this State. There is nothing said, either in the Constitution, statutes or decisions of Alabama, about the power of the owner to remove his slaves to a non-slaveholding State, either by himself, his agent or his personal representative; nor any attempt to forestall emancipation by such means.

But it is argued that these bequests are opposed to the settled policy of this State. Now we have seen, in the language of the Chief Justice (Collier) in Trotter v. Blocker, 6 Por., 292, that "independent of legislative grant of power,

it was permissible at common law for the master to set at liberty his slaves." This he might have done in this State, the statutes which prohibit him aside. Much more then might he have sent them out of the State, to be manumitted under a foreign jurisdiction; and we are called upon to restrain, or rather to deprive, the master, or which is the same thing, his personal representative, acting in accordance with his declared will, of this clear common law right. We can only ascertain the policy of the State from the laws which have been enacted by the legislature, or set forth in the Constitution; for, were we to go outside of these for a rule of decision, and look to the conflicting views of politicians, as to what line of policy is most prudent to be pursued by the State; or disregarding these, should ourselves determine that it is wise and politic, as tending to guard the institution of slavery, that no slaves should be permitted to be taken from the State for the purpose of emancipation, we should manifestly assume the functions of legislators, and not judges. The legislative authority has said, that slaves in this State shall continue such while they remain here, unless for good cause shown to the Probate judge, upon the petition of the master, after due publication made, they are set at liberty by the decree of such judge, and then on condition of their removal without the State in twelve months; but the right of the owner to take or send them off as slaves so long as they remain in this state, but for the purpose of emancipation in a State where, by the law, this may be effected, has not been prohibited. Can this court superadd this inhibition? However much we might desire the law to be different, however much we might suppose sound policy requires that a restraint should be imposed upon this natural right of causing one's property to be removed to another State where it may be dealt with injuriously to our institutions, still, it is not for us to change or make the law. Our solemn duty is to administer it as we find it. It is not for the court, but for the legislature, to determine whether there is too great a disproportion between the white and slave population of Alabama, or what number of slaves would best contribute to the security of the institution, and to the development of the wealth and agricultural resources of the State. If, influenced by our views as to what is the policy of this

State with respect to manumission in another State, we should hold that the personal representative of Atwood shall not take the slaves mentioned out of this State, because it would to this extent lessen the number of slaves, and, consequently, the wealth of Alabama, and would be adding to the free negro population of some sister State persons who may contribute to incite our slaves to insubordination or insurrection, upon the same principle we must hold every bequest of a slave to a person residing in a free State void, because, if the executor delivers the slave to the legatee in such State, it works his manumission. Indeed, it is difficult to calculate the results to which such a principle of decision might lead. In this case, the distributees all reside in non-slaveholding States; so of the residuary legatee. Now, although we might hold the will void so far as it directs the removal of the slaves, because its effect would be to emancipate them; it is clear the same result might follow, unless we could also say, that the parties entitled, under the will, to them, should not remove them to their places of residence; for if they should do so, emancipation would follow. But is any such power vested in the court? Could we declare a bequest of slaves to one whose known feelings upon the subject would prompt him to remove and thus to emancipate the slave, void, as an evasion of the statute against emancipation? Or can the court hold that, because an abolitionist is next of kin to the slaveholding intestate, the law of succession in such case must yield to the policy of the State against emancipation? Most certainly not. We must not suppose the legislature of the State unapprised of the condition of the institution, and the history of emancipation by removal of slaves, which has frequently been effected for years past. And it is altogether reasonable to infer that, had such removal been opposed to the policy of the State, laws would have been passed prohibiting it. How far the legislature may go in imposing restrictions on the power of transporting slaves from this to a free State, is not a question now before us, and of course we express no opinion concerning it.

There have been several adjudicated cases referred to by the counsel for the bequests, to be found in the reports of our sister States, fully sustaining the validity of the trusts created

by this will. The case of Pleasants v. Pleasants, 2 Call's R., 270, decided by the Court of Appeals of Virginia in 1799, has already been incidentally referred to, but deserves a more particular notice. At the time of the execution of the will of John Pleasants, which was under consideration in that case, it was not lawful to emancipate slaves in that State, but the testator being desirous of freeing his slaves, and supposing doubtless that the law would be changed, inserted in his will a provision, that whenever the laws of the country should admit of it, he desired all the slaves of which he was possessed to be immediately free upon their arriving at the ages of thirty years, together with their increase, subject to certain discretionary powers vested in his executors. A law was afterwards enacted in Virginia, authorizing emancipation; and the son and heir of the testator brought the bill against the persons to whom the slaves had, in the meantime, been bequeathed, to have them delivered up to him, and to have the aid of the court in directing the mode of emancipating them, &c. The Chancellor held the bequest valid, notwithstanding when the trusts were created the statute forbid emancipation, except for meritorious services to be judged of by the executive; and the Court of Appeals affirmed that view of the decree. They were considered executory bequests to vest upon a future contingency, and to be rendered effectual when the trustees might lawfully execute the trust. See also Elder v. Elder's Executors, 4 Leigh's Rep., 252. The case of Fisher's negroes against Dobbs et al., 6 Yerg., 119, goes strongly to support the bequests in this. It appears in that case, that before any provision was made by the statute law of Tennessee for the emancipation of slaves by will, Peter Fisher, in July, 1827, made his will, containing a provision that all his slaves should be free. The act then in force, authorizing emancipation, required that it should be effected by petition to the County Court or Chancellor, "and if the court, upon examining the reasons and motives set forth in the petition of the owner, should be of opinion that acceding to the same would be consistent with the interest and policy of the State," then the court was authorized to sanction such emancipation. Some two years after the making of this will, the legislature of Tennessee passed an act,

providing "that where any person shall, by his last will and testament, have directed any slave or slaves to be set free, it shall be the duty of the executors or administrators with the will annexed, to petition the County Court accordingly;" and it further provided, that if they fail or refuse so to petition, the slaves by their next friend may do so, and if the Chancellor is of opinion they ought to be set free, he may so order, requiring bond to indemnify the county as provided by the previous laws.

After the passage of the last named act, the slaves by their next friend filed their bill; but while it was pending, in 1831, the legislature passed an act to explain what they meant by the act of 1829, and in which it was declared, that said last named statute should in no wise be construed to extend to wills which were executed before the passage of said act, and requiring that all suits instituted under said act upon wills made before its passage, should be stricken from the docket, and the papers were ordered to be transmitted to the clerk of the County Court. The court held, that the bequest was valid; that the bill was well filed, and that the subsequent act was unconstitutional, as an unwarrantable interference by the Legislature with the duties devolved by the Constitution on the Judiciary.

Catron, C. J., said: "By the common law, the owner of a slave might manumit him at pleasure. The acts of 1777 and 1801 prohibited this, unless the Government consented to the contract of manumission. To give this assent, the County Courts were vested with authority. A deed or will of manumission is not valid, but binds the owner or represesentative of the testator, as between him and the slave. Before the act of 1829, the master or his representative was to do the first act; namely, petition the court for the Government's assent. The slaves had no power to cause their rights to be enforced in the courts of justice." He then refers to the subsequent act, giving them this power, and says that before its passage the negroes took a right, a common law right, binding on the executors as trustees, but their remedy rested with the executors. He might petition the County Court or not, at his pleasure. If he did, the distributees of Fisher could not complain; citing 2 Yerg., 563. Here, then, was a trust which the trustees

might lawfully have carried out. Yet, when it was created, there were no means provided for its enforcement. The case of Elder v. Elder's Ex'r., *supra*, furnishes a strong example of an executory trust of freedom, dependent upon removal to a free State, and which removal (to Liberia) was there said not to be contrary to any policy of the law. Per Tucker, President, 4 Leigh, 261.

In the case of James Frazier *et al.* v. The Executors of John Frazier, deceased, reported in 2 Hill's Ch. R., 304, the testator, by his will, after giving directions as to the disposition of his personal estate and the hiring of his slaves, and making provision for his wife, declared—"And after the decease of my wife, Nancy Frazier, it is my will and desire that the whole of my negroes be set free by my executors, and the amount of money arising from their hire, be equally divided among said negroes; and if the hire does not amount to one hundred dollars each, it shall be made up to them out of the other part of my estate before mentioned; the interest of the money is to enable them, with the assistance of the Government, to go to Domingo to be colonized, or to any part that they with Government may choose."

The bill was filed by the next of kin of the testator, claiming, amongst other things, the negroes and an account of their hire, on the ground that the provisions of the will for their freedom, &c., were void, as being contrary to the policy of the laws of the State of South Carolina. And the Chancellor (Desaussure) who tried the cause in the primary court, was of the opinion that the statute of that State against emancipation, and which declared that "no slave shall hereafter be emancipated but by act of the legislature," rendered the bequests relating to the slaves absolutely void, and so decreed. Upon appeal, and after able argument, the Court of Appeals held the trusts valid; and O'Neal, J., in delivering the opinion, said: "As a general rule, to which there is no exception, unless it be by express statutory provisions, it may be laid down, that the owner of property may direct his executor to dispose of it in any way which he could." He maintained that, while the act prevented emancipation within the State, it did not deprive the executor of the power of doing what the testator might have done; and as it was clear the testator might have

removed the slaves in his life time to a free State, and have thus emancipated them, it followed that his executor could be empowered by him to do the same thing.

Perhaps the principle thus broadly laid down by the learned Judge, could not be maintained as of universal application; nevertheless, we esteem it a general rule, and fully recognize its application to the case before us.

It was argued in the case last referred to, as in this, that there was no means of enforcing the trust, and that it was consequently void. Upon that point the court say: "It is said, how can the court compel the executors to carry such a trust into execution? For the slaves themselves cannot, nor can any other person, for them, file a bill to compel the executors to execute a will in this respect. But I apprehend there is in this case, and others like it, no difficulty. For on a bill filed by the heirs to partition the slaves, the court, if on looking into the will they should find the executors could execute it, by sending the slaves out of the State and there setting them free, would order them so to discharge the trust reposed in them by the testator. In other cases, the executors' oath to execute the will, and the fair claim which they have to the confidence of the court by the confidence reposed in them by the testator, are sufficient guaranties that such a bequest will be faithfully executed." And the slaves in that case were ordered to be forthwith removed by the executors beyond the limits of South Carolina, to some place where it would be lawful to emancipate them, and to be there emancipated, and the provision for such removal was held to be valid. The question, as it is substantially presented before us, has undergone a most thorough and elaborate investigation and discussion in an adjoining State, Mississippi, whose laws upon the subject of emancipation at the time the controversy arose, were not essentially different from our own, save that the legislature, instead of the court, was to judge of the meritorious cause for the emancipation.

In Ross & Ross v. Duncan et al., and the same v. Vertner et al., 1 Freeman's Ch. Rep., 587, it was held, that a trust created by will for the removal of slaves to Liberia or elsewhere, there to remain free, was not invalid; also, that a trust may be created, which may be perfectly consistent with

the law, and yet the law may have pointed out no mode of enforcement; still, it would not interpose to prevent its enforcement, but would leave its execution to the voluntary action of the trustee, and the doctrine, as asserted by Judge O'Neal in Frazier v. Frazier *supra*, was affirmed, that "the right to dispose of property by will is as broad and comprehensive as the right of disposition by the testator while living."

The same case afterwards came before the High Court of Errors and Appeals of that State, by appeal from the decree of the Chancellor, (see 5 How. Rep., 305,) and after very able argument by learned counsel, that court affirmed the decree, holding that it was not against the policy of the State of Mississippi for the owner of slaves to send them out of the State for purposes of manumission, and that a will requiring the executors to send the testator's slaves to Liberia, there to remain free, created a valid trust.

The question again came up in a recent case (1846) before the same court, Wade et al. v. The American Colonization Society, 7 Smedes & Marshall's Rep., 663, and the doctrine as previously asserted, was re-affirmed; and it was held, that the Court of Chancery might well entertain a bill at the instance of the trustee who was charged with the duty of removing the slaves, so as to enable him to execute the trust; that the slaves, by the will requiring their removal, acquired an inchoate right to freedom, which became perfect upon their removal, and that consequently the trusts were not void for want of capacity in them to take. It was, however, stated as a *quere*, whether, if the testator had required his slaves to be sent to Africa, and had appointed no trustee to take them, the slaves would have possessed any remedy to enforce the trust.

In Leech v. Cooley, 6 Sm. & Mar., 93, the testator by his will directed "his slaves to be set free and sent to Indiana or Liberia, as they might prefer," and directed a sale of certain other property, and part of the proceeds to be paid to the slaves thus liberated.

It was held, that the bequests were valid; that the executor might proceed in their execution; that the bequests to the slaves were not void for want of capacity in them to take;

that if they complied with the terms of the will, then the legacy was valid; otherwise, void. It was further held to be the policy of the State of Mississippi to prevent free persons of color from remaining in it, and that such policy did not conflict with the provision in the Federal Constitution which declares "that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," as no person of color could become a citizen within the meaning of this clause.

In the State of Georgia, where emancipation within the State is forbidden, it was recently held by the Supreme Court in the case of Vance v. Crawford, 4 Georgia Rep., 445, that it was not against the policy of that State for the owner to remove his slaves out of it for the purpose of manumission, and that having this power, he could direct it to be done by will; and a bequest to executors for the purpose of manumission by removal, and directions to pay certain sums to the freed persons, were held valid. To these other authorities might be added; but if any point may be considered as settled by the consistent decisions of our sister States, the cases above cited establish the proposition that, unless restrained by positive enactment, a testator may, by his will, effect the manumission of his slaves, by vesting the title to them in trustees for the purpose of their removal to a free State, there to enjoy their freedom.

It is, however, contended by the learned counsel, that it was the testator's intention to free his slaves in this State, and the direction to remove them was given merely to enable them to remain in that condition. It is true, the will is inartificially worded, and the construction contended for would appear correct when applied to isolated clauses of it. But it is our duty to arrive at the intention of the testator to be gathered from the whole will, and to give effect to that intention if lawful. Looking to the whole instrument, it is impossible, we think, to mistake the intention. It is clear that the testator was fully apprised of the impracticability of liberating his slaves, so as to entitle them to freedom in this State. This is shown by the fact, that he vests their bondage, title and ownership in his executors for the purpose of their removal to, and permanent settlement in a free State, no more to be

removed into a slave State, the declared object being to enable them to enjoy their freedom. He makes provision for their removal, and for their *status* as slaves to continue until they shall be removed, "knowing full well," to use his own language, "they cannot be given their freedom to remain in this State." The intention also with respect to the legacies we think is clear. The executors were to invest the money bequeathed for the benefit of these slaves in lands, in some one of the States of Indiana, Illinois or Michigan, in part, and the balance to be loaned on interest, which interest is to be paid annually and reloaned; and the titles to the lands and bonds for the money are not to be delivered to them, until after they are removed to a free State and provided for as is required by the will. Here is a future period fixed by the will, when they are to come into the possession of these legacies; a period at which they shall have acquired the capacity to take. Until then, the executors hold the funds, as they do the bondage and title to the slaves, in trust, upon a use to spring up or attach upon the condition of removal, when the intended beneficiaries shall be capable of taking. Words *in praesenti* will be taken in a future sense in order to serve the manifest intent. 1 Powell on Dev., 263–4.

Nor is it any valid objection to the validity of the trusts, that no mode has been provided for the enforcement of their execution. Many trusts and conditional bequests may be valid, and yet not capable of being enforced by judicial tribunals. Property may be granted on any condition which is not against the law; as "an estate, upon condition that the grantee shall go to Rome, and for breach of that condition, the heir may enter, but there are no means of compelling a journey to Rome." 1 Co. 22 b; 4 Wheat. 35. So, also, in cases where there is a condition precedent to a gift of a legacy, or some act required to be performed by the trustee, and the performance of the act or condition is discretionary with the trustee, there the interest does not vest, until the precedent act or condition is performed; but although the court will not compel the performance of a purely discretionary power, yet when performed the estate or interest vests. Hill on Trustees, 490, and authorities cited in note o.

Conceding in this case, that there is no one who could com-

pel the executor, or the administrator with the will annexed, to carry this trust into execution, and that he must be left to his own conscience, and to the obligation imposed by his official oath, yet, as we have seen that the trusts are not illegal, and the removal may lawfully be made by the representative of the deceased, it is clear the court will not interfere to prevent the trustee from complying with and carrying out the lawful desire of the testator. Whether it is such a trust as the court may compel the execution of, against the will of the trustee, is not now presented before us; it is sufficient that the trustee is willing and proposes to carry it into execution. It is he who interposes these trusts and asserts their validity; and it remains only for the court to direct him to do what, by his answer, he avers his willingness to perform.

The rule, that a court of equity subjects trust estates to the same rules to which a court of law does the legal title, does not affect the validity of these trusts, since it is well settled, that future contingent interests may be limited by will, if they be not too remote, to spring up and attach upon the happening of some subsequent event. And in respect to personal property, it is said, that no intermediate estate is required to support such future contingent interest; but an interest created by executory bequest will be valid, in the absence of such intermediate estate. Williams on Personal Property, 194.

As to the argument that the States whose courts have decided according to the view we have taken of this will, have, by statute, subsequently forbidden the manumission of slaves by directions in wills for their removal to free States, we have only to say, it proves that those States deemed an amendment to the law necessary; but until it is so amended, it is the duty of the courts to give it effect.

2. It follows, from what we have already said, that the legacies to Alexander and Ann, who have been residing in the State of Ohio for many years, are valid. These negroes have not escaped from labor or service, but have been placed in Ohio that they might enjoy their freedom, as is evident from the tenor of the will of their late owner, according to which, they are never more to be taken to a slave State. They must, therefore, be regarded as free persons of color

residing in the State of Ohio, and as such, are capable of taking. See Tannis v. St. Cyre, at present term; Josephine v. Pantney, 1 La. Ann. Rep. 329; Davis v. Tingle, 8 B. Monroe, 539; see, also, cases cited on the brief.

3. The land warrants, authorizing the selection and location of certain amounts of land out of the unappropriated lands belonging to the Government of the United States, must be regarded as land, and pass to the heir at law, unless specifically devised. They cannot, so far as the rules of descent are concerned, be distinguished from bonds for title to real estate, which go to the heir, unless devised by the will.

4. It is too well settled to require argument in support of the proposition, that only such real estate as a testator had at the time of the execution of his will, passes under it; for, unlike a will of personal estate, a devise operates on real estate owned at the date of the will. It is considered as a conveyance, having its inception at the time the will is executed, and is confined to the particular estate which the devisor then had to dispose of. Lovelass on Wills, 245.

It results from what we have said, that the Chancellor erred in the decree which he made. His decree is, therefore, reversed, and the cause is remanded, that further proceedings may be had in accordance with the views expressed in this opinion.

The course pursued in the case of Frazier v. Frazier's Ex'r., by the Court of Appeals of South Carolina, and which meets our approbation, will constitute a sufficient guide for carrying the trusts into execution.

As it was proper to obtain the opinion of this court for the direction, as well as protection of the administrator in the discharge of his duties, we think he should pay the cost of this case which have accrued in this court, to be allowed him on final settlement out of the estate he represents. Decree accordingly.

HENDERSON ET AL. *vs.* SUBLETT ET AL.

1. Although every inadequacy of price will not be sufficient to set aside a sale of lands made under execution, yet, when the inadequacy is so gross as, at once, to shock the understanding and conscience of an honest and just man, it will, of itself, authorize the court to set aside the sale.
2. In all such cases, the sheriff should not proceed with the sale, but should return the *fi. fa.* stating the levy and that the property was not sold for want of buyers, and wait for a *venditioni exponas.*
3. Any person who is a party to the suit, or connected with the title to the lands sold, whether his interest be legal or equitable, may be heard on a motion to set aside the sale for inadequacy of price.

ERROR to the Circuit Court of Benton.
Tried before the Hon. THOMAS A. WALKER.

MOTION to set aside the sale of lands, made under execution by Sublett, as sheriff of Benton county. The plaintiffs in the motion were Meredith P. Henderson, in right of his wife Elizabeth A., formerly Elizabeth A. Lindsay, and Flora E. Lindsay and Wm. W. Lindsay, minors, by said Henderson as their next friend; and the defendants were the sheriff, the purchaser and the plaintiffs in the several executions.

The executions under which the land was sold were all against John Lindsay, in favor of the defendants Hudson, Clarke, Moore & Crow, Woodward & Porter and Thomas Sparks. The land was proved to be worth $1800, and was bought at the sale for $5, by defendant McCampbell. The plaintiffs in the motion claimed an interest in the land, under a deed of trust made by Lindsay to one Houston, as trustee, to secure Hindman and McCollum, who were Lindsay's sureties on his bond as guardian of said Elizabeth A., Flora E. and Wm. W. Lindsay. They also showed that Houston and Hindman had removed from the State, and that McCollum was dead; that they (plaintiffs) had a bill pending in the Chancery Court of Benton, of which McCampbell, the purchaser, had notice, in which they were seeking a settlement of their guardian's accounts; that Lindsay was a defaulter, as their guardian, to the amount of $1300, and in said bill they were seeking to be substituted to the rights of Hindman and McCollum under Lindsay's deed of trust to Houston.

It was also shown that said deed of trust was executed in 1842, and was duly recorded; that the judgments of all the plaintiffs in execution were obtained in 1848 and 1849, except that of Sparks, which was rendered in 1840; that in advertising the land for sale, the sheriff had not named the execution in favor of Sparks, but, after naming the other plaintiffs in execution, added the words "and others;" nor was it stated, at the sale, that the land was sold under the execution in favor of Sparks. The sale was forbidden by A. J. Walker, on the part of Houston, who claimed title to the land under a mortgage made to him by Lindsay in 1838. Nothing was said at the sale about the deed of trust under which plaintiffs claim, either by Walker, as Houston's agent, or by any one else.

At the time of sale, McCampbell was the attorney for all the plaintiffs in execution, except Sparks; he was also the counsellor and director of the sheriff in the levy and sale of the land, and became the purchaser, as before stated. The sale was made during the temporary absence of Lindsay, and the testimony leaves it doubtful whether Henderson was present at the sale.

The court refused to set aside the sale, under this state of facts, and its judgment is now assigned for error.

WHITE & PARSONS, for plaintiffs in error:

The plaintiffs in error insist that the sale should have been set aside, on account of the gross inadequacy of price, in connection with the other facts shown by the record. The land was proved to be worth more than enough to pay the plaintiffs' demand, and the judgment in favor of Sparks, whose lien is older than the deed of trust. Plaintiffs have such an interest as will authorize them to make the motion. Mobile Cotton Press v. Moore & Magee, 9 Porter, 687; Abercrombie v. Conner, 10 Ala. 293; Hubbert v. McCollum, 6 ib. 224; Lee v. Davis, 16 ib. 516.

The sale ought to have been set aside, for another reason: the execution in favor of Sparks was not named in the advertisement, nor was it mentioned at the sale, as one of the executions under which the sale was made. It was an important fact, which ought not to have been suppressed.

J. B. MARTIN, *contra*:

1. Henderson's wife should have been joined as a plaintiff in the motion with her husband. Her right was a mere chose in action, for which, if a settlement were had in the Court of Probate, a decree would be rendered in the name of husband and wife; or if suit is brought, it must be in their joint names. Parks v. Stonum, 8 Ala., 752; Morris v. Boothe & wife, ib., 907; Mitchell v. Mitchell, ib., 414; Welch v. Welch, 14 ib., 76; Mayfield v. Clifton, 3 Stewart, 375. The distinction between this case and that of Toland v. Magee, in 8 Porter, is, that there the ward's estate consisted of negroes in the guardian's possession, while here it consists of money, which the guardian was bound to loan out; and, as we must presume that he did his duty, her right is strictly a chose in action. Bibb v. McKinley, 9 Porter, 636; 2 Serg. & R., 491; 3 Cowen, 590; 8 Mass., 99; 13 ib., 384; Hogan v. Bell & wife, 4 Stew. & P., 287.

2. These plaintiffs do not sustain such a relation, either to the process, the parties thereto, or to the land sold, as will authorize them to make this motion. Only the parties to the process, with their privies; or, at farthest, a vendor with warranty, or the legal owner of the land, can make such a motion. Fournier v. Curry, 4 Ala., 321; Foster v. Mabe, ib., 402; 9 ib., 959; ib., 937; 8 Johns., 257; 15 Ala. Rep., 212; 4 ib., 667. Before the plaintiffs would have any such right as would entitle them to relief against this sale, they must show that Lindsay has made default as guardian, that he and his securities are insolvent, and that they have been subrogated to the rights of the sureties under the deed by a proceeding in chancery, to which they and their guardian were parties. A court of chancery is the only forum in which such a proceeding could be had, or judgment pronounced; plaintiffs' remedy, therefore, is in equity, for their interest, if any they have, is a contingent equitable one.

3. The parties moving to set aside a sale, must show either fraud, or such irregularity in conducting the sale, together with injury to their rights, as will satisfy the court that the sale should not be allowed to stand. Drane & Smelser v. Henderson, 15 Ala., 425. It is not shown by the record that the plaintiffs' guardian is insolvent, that he has squandered

their estate, or that his securities are insolvent; if this motion should prevail, it will appear that strangers to the record, without any interest either legal or equitable, have set aside a sale with which the parties themselves are entirely satisfied. If the land had brought more than enough to satisfy the execution of Sparks, the plaintiffs in the junior executions would have been entitled to it, as against these plaintiffs; if it had brought more than enough to pay off all the executions, Lindsay, the defendant in execution, would have been entitled to the surplus. How, then, can the plaintiffs be benefited by setting aside the sale? It was no irregularity to sell under several executions; nor was the omission to specify by name all the executions, such an irregularity as will avoid the sale. Advertising is for the benefit of the defendant in exetion, and he alone can complain; and here the defendant knew that Sparks' execution had been levied. 16 Vermont, 620; 2 ib., 524. Besides, it was announced that there were other executions than those specified.

4. It is contended, that the sale should be regarded with suspicion, because McCampbell, who became the purchaser, was the attorney who obtained some of the judgments. But there are two facts which take this case without the influence of the rule; he was not the attorney who obtained or superintended the collection of the Sparks' judgment, and it is only in the execution of this that complaint is made; the rule only applies where the attorney buys for himself, or is benefited by the purchase, and is intended for the protection of the plaintiff, as much as the defendant or any other party. 5 Watts, 304. The purchase here was made by the plaintiffs in the junior judgments, by their agent, and they were guilty of no fraud; by their purchase, payment and deed, they received as good a title as a stranger would. 1 Miss., 704; 10 Vermont, 346; 4 Taunt., 822.

5. Inadequacy of price is not a sufficient reason for setting aside the sale. Powell v. Governor, 13 Ala., 516; Litt. Select Cases, 256. The inadequacy is accounted for by the fact, that Houston's attorney forbid the sale, and asserted a title under a mortgage which was older than even the Sparks judgment.

The case of Lee v. Davis, in 16 Ala., bears no analogy

to the case at bar. In that case, the plaintiff in the motion was not only in possession of the land, but had a legal title to it; there was also proof of actual fraud, and the purchase was made by the attorney of the plaintiff in execution for himself.

LIGON, J.—Two questions present themselves in this case: 1st. Was the conduct of the sheriff in the levy and sale, under the executions in his hands, of such a character as to authorize the Circuit Court to set aside the sale, and vacate and annul the deed made to the purchaser? 2d. Have the plaintiffs in this motion such an interest in the lands sold, as to entitle them to come in and make the motion?

1. On the first question I would remark, that it has already been decided by this court, in the case of Lee v. Davis et al., 16 Ala. 516, and we concur fully in what is there said upon the subject. There seldom occur, in the history of judicial decisions, two cases so perfectly analogous in their facts, as the case cited and the one under consideration. Our conclusion is, that the sale should have been set aside, and the Circuit Court erred in not doing so.

An expression, however, occurs in the opinion of the court, in the case of Lee v. Davis et al., *supra*, which, without some explanation and limitation, cannot command our assent. It is this: "Inadequacy of price may not be sufficient cause for setting aside a sale of land under execution; but when coupled with other circumstances, it has induced the courts to avoid the purchase." We readily concede, that every inadequacy of price will not be sufficient to set aside a sale of lands under execution; but when the inadequacy is so glaring and gross, as at once to shock the understanding and conscience of an honest and just man, it will, of itself, authorize the court to set aside the sale. For instance, if, as in the case under consideration, a tract of land of the value of $1800 is sold for $5, the court out of which the execution issued should not hesitate to set aside the sale for this cause alone. In all such cases, the sheriff should not proceed with the sale, but return the *fi. fa.* levied, but the property not sold for want of buyers, and wait for a *venditioni exponas.*

It would be difficult to lay down a general rule on this subject, which would adapt itself to all cases. The one just sug-

gested would, perhaps, be as safe as any that could be proposed. Still, much would be left to the sound discretion of the sheriff, and should he fail to exercise it fairly, the court could review it, and thus decide the question of abuse or no abuse of process, according to the circumstances of each case as it arises. But it would be monstrous to hold, that a sale should be allowed to stand, which would invest the purchaser with the title to property, whether real or personal, at one three hundredth part of its value, or even less, as is the case here.

The practice suggested above has long since obtained in England; and if the sheriff, after having levied on property of sufficient value to satisfy the *fi. fa.* fails to observe it, and sacrifices the property by selling it at a sum greatly below its value, and insufficient to pay the plaintiff's demand, the courts there have compelled him to satisfy, out of his own means, the sum remaining unpaid. Keightly v. Birch et al, 3 Camp. 521. See, also, the case of Lankford v. Jackson et al., decided at the present term, in which the English authorities are collated by Chief Justice Chilton.

2. On the second point presented, we think it clear that any person who is either a party to the suit, or connected with the title to the lands sold, may be heard on these motions. It is not necessary that the interest of a party be legal. If he have an equitable interest, it will suffice for this purpose, inasmuch as the questions involved in the motion do not bring up the title to the lands, but the oppressive or fraudulent use made by the sheriff of the process of the court, by which the interest of the party complaining has been injuriously affected.

In the case of Lee v. Davis et al., heretofore cited, it was held: "That where the injury complained of is in the execution of the process, and not for a defect in the process itself, it is competent for any person whose interests are thereby prejudiced, to move the court to avoid the sale."

That these plaintiffs have an interest in the lands sold, can scarcely be seriously questioned. Lindsay, the defendant in the executions, conveyed these lands to Houston, in the year 1842, in trust for the benefit of Hindman and McCollom, who were his sureties on his bond as guardian for these plaintiffs. The record shows, that his guardian's accounts are still unset-

tled, and that he is a defaulter to his wards to a large amount. They are seeking the recovery of this sum in the Chancery Court, and asking to be substituted to the right of Hindman and McCollom under the deed. They also show, that McCollom is dead, and Hindman has removed from the State. Houston has also removed from the State, but was present on the day of sale, by his agent, not to assert his right under this deed, but to set up an adverse title in himself under a former deed from Lindsay. It is also shown, that the plaintiffs had already claimed an interest in the lands in the Chancery Court, the only proper forum in which they could appear to claim their right, and in which, doubtless, (if nothing more appears than is disclosed by this record,) it will be allowed them. It is clear, that they have such an equity in the lands as will enable them to come into a court of law on the motion under consideration.

These views do not militate against the decision of this court in the case of Nuchols v. Mahone, 15 Ala. 212, to which we have been referred by the counsel for the defendants. The questions in the two cases are essentially different, and the results to the parties, arising out of the judgment of the court in setting aside the sale, wholly dissimilar. In that case, the objection to the *fi. fa.* was, that it was issued after the death of the defendant, and went to the process itself, and not to the abuse of it in its execution. A latent defect in the *fi. fa.*, although sufficient to render it void *ab initio*, cannot be regarded as an abuse of the authority of the sheriff, or in any manner enter into its execution, where the officer has only followed its mandate. A purchaser under it would take no title, and those whose interests are apparently affected by it may show the process itself to be void, and thus successfully defend themselves at law, against any right which the purchaser under it might attempt to set up against them. In the present case, the objection goes alone to the execution of the process, and the objection is such as could not avail the parties injured in any action involving the title to the land. Lee v. Davis, *supra*.

Our conclusion is, that the court below erred in repudiating the motion. Its judgment is therefore reversed, and the cause remanded, that it may be proceeded in according to the prin-

ciples of this opinion, and the parties be placed in *statu quo* before the sale by the sheriff.

GUNN *vs.* BRANTLEY.

1. A mortgagee or trustee cannot deprive the mortgagor or *cestui que trust* of his equity of redemption, and create an adverse interest in himself, by a sale of the land without a decree of foreclosure and becoming the purchaser himself.
2. A bill filed by the *cestui que trust* to set aside a sale at which the trustee became the purchaser, is demurrable, if it does not contain an offer, or what is equivalent to an offer, to do what is equitable, by the repayment to the trustee of the amount actually paid by him.
3. But the bill is not demurrable on this ground, when it alleges that the rents and profits received by the trustee are sufficient to reimburse him for the amount paid by him, and the complainant offers, if they are not sufficient, "to abide the decree of the court."
4. The vendor is not a necessary party to a bill filed by one of his vendees against another, respecting transactions between them under a contract for the division of the land, when he has divested himself of all interest in the subject matter of the suit, by making title to the land to one of the vendees and taking up his bond for titles to the two jointly, and the complainant does not complain of his action in this respect.
5. If objections to testimony are taken before the commissioner and are overruled by him, they must be regarded as waived, unless brought to the notice of the Chancellor by exceptions filed or motion to suppress.
6. In all cases of concurrent jurisdiction, statutes of limitation are equally as obligatory in courts of equity as in courts of common law; and in many cases, mere lapse of time and the staleness of the claim will constitute a defence in equity, when the statute does not apply.
7. The mortgagor may redeem at any time within the period prescribed by the statute for the limitation of rights of entry and actions for the recovery of lands.
8. An answer contradicted in a material point loses its weight as evidence.
9. A mortgagee who purchases at a fraudulent sale made without a decree of foreclosure, is not entitled to compensation for improvements made by him on the land.

ERROR to the Chancery Court of Macon.

Heard before the Hon. W. W. MASON.

The bill in this case was filed by James Brantley, the de-

fendant in error, against Larkin R. Gunn, the plaintiff in error. It alleges, that, in the year 1837, Brantley and Gunn purchased from one Dozier Thornton a tract of land, containing six hundred and forty acres, at eleven dollars per acre, and that Thornton executed to them jointly his bond for titles thereto; that said Gunn, in part payment for said land, delivered to said Thornton a note on Townes & O'Brien for $4057, and that Brantley executed his two notes for the balance of the purchase money, with Gunn as security, one being for $1000, due December 25, 1837, and the other for $2075 70, due December 25, 1838; that for the purpose of securing Gunn against liability on his suretyship on said notes, Brantley allowed him to retain the bond for titles, and afterwards executed to him an instrument in writing transferring to him all the right, title and interest which he (Brantley) had therein, until the balance due on said notes was paid; that soon after their purchase, they verbally agreed to divide the land between them, Gunn taking all that part lying south of Osenappa creek, containing about four hundred and seventeen acres, and Brantley taking all that part lying north of said creek, being about two hundred and twenty-three acres; the price to be accounted for at $11 per acre; that Brantley paid his first note to Thornton in full, and $700 on the second note; that Thornton brought suit for the balance due on the second note, and recovered judgment against Gunn for $1630 89; that an execution was issued on this judgment, and was levied, by Gunn's direction, on that portion of the land which Brantley was to take under their division; that this land was sold under the execution, and was purchased by Gunn for $760; that it was worth $2500, at the time of the sale, but, by the fraudulent conduct and representations of Gunn, it only brought $760; that, before the sale under the execution, Gunn had obtained a deed from Thornton to the entire tract, and had surrendered to him the bond for titles; that Gunn took possession of the four hundred and seventeen acres lying south of Osenappa creek in December, 1838, and has been in possession ever since; that he also took possession of the two hundred and twenty-three acres immediately after the sale under execution, which was on the 27th November, 1840; that of this last named tract, about seventy

acres were cleared, and in good order for cultivation; and of the other tract he had about three hundred acres in cultivation for a long time, and had enjoyed the profits of the whole tract, from December, 1838, up to the time of filing the bill, which was on November 1, 1847, and that these profits were worth $1000 a year; that of the sum for which Brantley executed his note to Thornton, Gunn should have paid the balance after deducting $2450, that being the sum to which the two hundred and twenty-three acres allotted to Brantley on the division would amount at $11 per acre; that Brantley has never assigned or conveyed to any one his interest in said land, except to Gunn, as aforesaid, to secure him against his liability on said notes; that upon a just accounting between him and Gunn, of the rents and profits of the land, he will not be indebted to Gunn, although the latter may have paid off the judgment recovered by Thornton against him; but if complainant is mistaken upon this point, and he should be found indebted to said Gunn, then he offers to abide the decree of the Chancellor; that if Gunn is allowed to retain the whole of the land, he ought to be charged with the $1700 paid by Brantley, and interest thereon; and if he is allowed to retain only the four hundred and seventeen acres, then Brantley is entitled to the possession and title of the remaining two hundred and twenty-three acres, with the value of the rents and profits, after deducting therefrom about $750, that portion of the $2450 which has not been actually paid to Gunn by Brantley.

The bill prays, that an account may be taken of the rents and profits of the land, and of each division thereof; also, of the amount of purchase money which each one paid, and ought to have paid; that a decree be rendered in one of the modes insisted on in the bill, and for general relief.

Gunn answers, admitting the purchase at the price charged, the execution of the bond for titles as charged, the payment by Gunn of the note on Townes & O'Brien, the execution of two notes as charged by Brantley, and that respondent was security on them; also the payment of the $1700 by Brantley on his notes, and the division of the land as charged. He insists, that, after these payments were made by Brantley, he and respondent had a settlement, on which it was ascertained

that there was due from respondent, for that portion of the land which he was to get on the division, the sum of $385 27, in addition to the amount paid to Thornton in the note of Townes & O'Brien, and that respondent paid this sum to Brantley on the 7th December, 1838, and took his receipt for the same; that on the same day, and after the receipt was given, Brantley assigned to respondent his interest in the bond for titles, and respondent denies, to the best of his knowledge and remembrance, that Brantley ever made any other instrument or assignment connected with said bond. He further admits, that he obtained title to the entire tract from Thornton, and that, judgment having been rendered against him in favor of Thornton, as charged, he directed the sheriff to levy the execution which was issued thereon on the two hundred and twenty-three acres of land which Brantley was to take under the division; that said land was sold, and was purchased by respondent for $760. He denies all fraud in relation to said sale, and alleges that he has since paid to Thornton the balance due on the judgment. The other allegations of the answer it is unnecessary to notice, as they have no connection with the points decided.

An amended bill was filed, which charges that the only object of the transfer of the title bond, whatever may have been its form, was, to secure Gunn against his liability on Brantley's note to Thornton, and to give him a lien on Brantley's interest in the lands, to the extent of his indebtedness for the same; that Gunn has materially injured the two hundred and twenty-three acres of land, since it has been in his possession, by clearing it.

The answer to the amended bill, amongst other things, insists that Brantley's transfer of the title bond was absolute, and that his interest in the land was thereby extinguished. The bill was demurred to, for want of equity, and because complainant made no offer to refund the amount paid by respondent for him; and the statute of limitations of six years was set up by way of plea.

The evidence shows that the title bond was transferred to Gunn to secure him as Brantley's surety on the notes for the purchase money of the land, and that when the balance due on said notes was paid, if Gunn had then obtained title from

Thornton, he was to convey to Brantley the two hundred and twenty-three acres which the latter was to take under the division; that Gunn had materially injured that portion of the land, by clearing it; that Gunn paid Brantley the sum of $385 77, on the 7th December, 1838, as a portion of the $1000 paid by the latter to Thornton on his first note; that Gunn directed the sheriff to levy the execution on Brantley's portion of the land, and became the purchaser at the sale for $760, which was considerably below the value of the land at that time. The officer who sold the land testified, that while Thornton was bidding at the sale, Gunn complained to him, (Thornton,) and with a good deal of feeling told him, "that he need not run up the land so, as his money was sure to him; and that all he, Gunn, wanted was, a title to the land." Another witness testified, that, in relation to the anticipated suit by Brantley against Gunn, the latter observed, "that if Brantley did sue for and recover the land, he would keep it in law long enough to tear it up and wear it out."

Several objections appear to have been taken before the commissioner, by the defendant, to the complainant's interrogatories, and these objections are endorsed by the commissioner on the interrogatories; but the record no where shows that they were acted on by the Chancellor, or that they were brought to his notice.

Upon the hearing, the Chancellor decreed the title to the entire tract to Gunn, free from all right or interest which Brantley had therein; and directed Gunn to pay Brantley the sum of $2650 38, the amount of the purchase money for the two hundred and twenty-three acres, deducting therefrom the said sum of $385 77, and all costs.

From this decree Gunn prosecutes a writ of error, and assigns for error: the admission of the evidence objected to, not sustaining the demurrer to the bill, and the rendition of the final decree.

G. W. Gunn and Belser & Harris, for plaintiff in error:

1. The bill cannot be sustained as a bill to redeem, as a mortgagor is not permitted to come into equity for that purpose, except upon payment of the whole amount due. Smith

v. Kelly, 27 Maine, 237; 3 Sandford's Ch. 450; 1 Strobh. Eq. 257. And where an agreement is to convey land, in consideration of the payment of a certain sum of money, equity will not compel a conveyance until the money is paid. Stone v. Buckner, 12 Sm. & M. 73; 2 Halst. 175; 2 Pick. 540; 8 Metcalf, 19; 6 Dana, 473; 8 Shep. 126; 10 Paige, 49; 7 Sim. 319; 11 Halst. 300; 7 Paige, 179; 2 Mass. 493; 8 ib. 551; 11 ib. 469; 3 Pick. 203; 11 ib. 475; 12 ib. 47; 14 ib. 397; 9 Sm. & M. 230; ib. 167. Such bills do not rest upon the same basis with bills to rescind a contract, relied on by defendant in error. 15 Ala. 502; 4 Porter, 297; ib. 374; 16 Ala. 196; 14 ib. 114; 5 Porter, 345; 1 A. K. Marsh. 287; 18 Johns. 144; 2 Pick. 540. Whether the transaction was in the nature of a mortgage or a conditional sale, under the most favorable view to complainant, respondent's obligation was, to convey to complainant upon his paying the balance due for the land.

2. Neither can the bill be sustained on account of the alleged fraud or mistake; first, because there has been a want of common and ordinary diligence. 3 Ala. 352. The fraud relied on must be distinctly alleged, and the proof must be clear, full and convincing. 11 Ala. 187; 10 ib. 548; ib. 116; 6 ib. 518; 12 ib. 678; 2 Porter, 526. Nor will the court impute fraud, where the facts and circumstances out of which it must arise, may consist with pure intentions. 2 Porter, 58; 15 Ala. 149; 5 ib. 90; 3 ib. 352. The time of the discovery of the fraud must be distinctly stated and proved. Besides the uncertain and contradictory statements of the bill, the allegations are not sustained by the proof. 5 Ala. 90; 6 ib. 518; ib. 581; 1 ib. 330; 16 ib. 793; 11 ib. 960; 15 ib. 634; 13 ib. 681. The allegations of the bill as to fraud are not sustained by the proof in a single particular, unless it may be in an immaterial point as to the sheriff's sale; and this proof is made by the deputy sheriff, who seems to have been a very willing witness for complainant.

3. If complainant had any equities by the terms of his contract, he has forfeited all right to relief, and his demand has become stale, although the statute may not govern the case. He had full notice in 1839, when the legal title vested in respondent by his purchase, and has remained silent from that

time until November, 1847. 9 Ala. 663; 3 ib. 762; 13 ib. 246; 2 ib. 555; 1 ib. 650; 17 ib. 472; 5 ib. 90; 2 Porter, 58. Relief will not be given to a party who has been guilty of long acquiescence and laches, while out of possession, and can show no actual hindrance or impediment, caused by the fraud or concealment of the party in possession. 2 Howard's U. S. R. 234. Complainant's acquiescence amounts to a waiver of the equity which he now seeks to set up. 2 Stewart's R. 520; 5 Porter 345; 6 Ala. 518. In cases like the present, the time will be computed from the date of the transfer.

4. The decree is erroneous, in requiring respondent to pay to complainant money which he had paid to Thornton, before the transfer of the bond, and with which respondent had no connection. This is subversive of every principle of equity, and without a precedent in chancery practice; it makes an entirely new and different contract between the parties from that which they had made for themselves; it makes Gunn take the entire tract of land, at a price greatly exceeding the price originally paid, and also makes him pay additional interest to complainant, for whom he had already made payment of a large sum. The decree cannot be sustained. 2 Barb. S. C. R. 586; 2 Johns. Ch. 125.

5. Upon the payment by Gunn of the debt to Thornton, he had the right to be subrogated to Thornton's liens, Champlin v. Williams, 9 Barr's R. 34; and the same rule applies, where different persons own distinct parcels; the one paying holds a lien upon the whole. 20 Vermont, 402; 1 Strob. Eq. 356; 7 New Hamp. 392; 5 Pick. 146; 8 ib. 497; 17 ib. 47; 19 ib. 231; 6 Paige, 583; 4 Johns. Ch. 370. But the receipt and transfer, in the absence of fraud or mistake, present the contract between the parties, and every presumption is in favor of their validity. 2 Porter, 520; 12 S. & M. 74. By the terms of this contract, Gunn had an undoubted right to receive the title from Thornton; nor is there anything in his acceptance of title which does not comport with fair and honest intentions. 2 Sugden on Vendors, 148; 8 Ala. 876; 10 ib. 636; 7 ib. 142; 2 Barbour's R. 16.

6. The sale of Brantley's portion of the land was, under the circumstances, consistent with equity and fair dealing. 9

Paige, 648; 2 Barbour's R. 270. The low price which the land brought, is not sufficient to induce a court of equity to set aside the sale, even upon the application of a creditor. Farmers' Bank v. Douglass, 11 S. & M. 469. The equity of redemption was the subject of seizure and sale under execution; and such sale divested all title of the mortgagor, and invested the same in the purchaser. 14 Ala. 114; 1 ib. 27; 7 ib. 386; 4 Kent's Com. 161; 5 H. & Gill. 312; 10 Johns. 481; 3 S. & P. 397; 7 Ala. 142; 10 ib. 636; 11 ib. 236; 8 ib. 876; 6 Iredell, 216; 5 Gill & J. 75; 11 Paige, 243; 10 S. & R. 261; 3 Edwards, 390; 9 Vermont, 155. If the sale had not taken place, Gunn had an undoubted right to hold the title until Brantley paid the balance of the purchase money. The sale, then, could not discharge Brantley's obligation to make payment.

7. Complainant having called for an account, and charged fraud, the responsive statements in the answer are conclusive, unless directly controverted by the evidence. 7 Ala. 582; 4 ib. 60; 16 ib. 600; 3 ib. 458; 19 ib. 370. A mortgagee in possession is not chargeable with the value of rents, except to the amount actually received. He is not chargeable with interest on rents, and is entitled to pay for improvements. McClanahan v. McClanahan, 6 Humph. 99; 6 Paige, 480; 2 Barbour, 216; 6 Gill & J. 275; 1 Johns. Ch. 620. The authorities relied upon by defendant in error are inapplicable; complainant will not be allowed, after treating the transaction as a mortgage, now to change his position, in order to defeat the compensation for improvements. 1 Ala. 496. Rents and profits can only be decreed upon real estate in the condition in which it was when sold. 9 Pick. 171; 8 Shep. 465; 6 Ala. 542; 7 Metcalf, 157; 2 Sandford's Ch. 273; 1 N. Hamp. 167; 1 Hill's Ch. 501.

8. The demurrer should have been sustained. Woodward v. Wood, 19 Ala. 213.

Was not the transaction an absolute sale, with the right to re-purchase? 7 Ala. 724; 4 Kent's Com. 144.

All the assignments of error are insisted on.

S. F. Rice, *contra:*

1. A mortgagee who has taken possession of the mortgaged

property, if it be a farm, is bound to keep it in good ordinary repair; he is bound to good ordinary husbandry and to procure a tenant or cause the farm to be tilled. He must account for the rents and profits actually received, or those which might have been received by reasonable care and prudence. He is bound to lay out money to keep the farm in repair and to preserve it, but he is not authorized to make new improvements and tack the expense to the amount due upon the mortgage, or pay it out of the rents and profits, except under very extraordinary circumstances. Shaeffer v. Chambers, 2 Halsted's Chancery Rep. 548; McConnell v. Holobush, 11 Illinois Rep. 61; Rogers v. Rogers, 1 Paige, 188; Hosea v. McLane, 14 Ala. 194.

2. It is a fraud for an agent to avail himself of his confidential relation to drive a bargain, or to create an interest adverse to that of his principal in the transaction; and the fraud creates a trust, even when the agency can be proved only by parol. Jenkins v. Eldridge, 3 Story's Rep. 181; 3 American Chancery Dig. 385, §§ 69, 70; Elliott v. Armstrong, 2 Blackf. Rep. 198.

3. It is a sound principle, that when one person, by his own fraud, intermingles his property with that of another, with intent to injure the latter, the person thus guilty of fraud must suffer. And if, by such fraud, the property of the innocent party is irreparably injured, and the court cannot see that it can indemnify him in any other way than by ordering the author of the fraud to restore the money paid on the property by the innocent party, with interest, this restoration will be ordered, and the wrong doer will be allowed to retain the property. Lanier v. Bank, 18 Ala. 628.

4. The statute of limitations cannot avail the defendant, even if it were properly pleaded. But it is not properly pleaded. Whether this be treated as a bill by a mortgagor to redeem, or to enforce a trust, the statute of limitations is not a bar. Mason v. Maury, 8 Porter's Rep.; Fenwick v. Macy, 1 Dana's Rep. 280; 3 American Chancery Digest, 46, § 242; ib. 50, § 282; Falls v. Torrance, 4 Hawk's Rep. 413. The letter of defendant, found in the record as part of the evidence, shows that the defendant cannot successfully claim the benefit of the statute of limitations.

5. The Chancellor's decree is founded upon sound principle. Harrison v. Mock, 10 Ala. 185, and cases there cited; Oliver v. Piatt, 3 Howard's Rep. (U. S.) 401; Green v. Winter, 1 Johns. Ch. R. 39; Osgood v. Franklin, 2 ib. 26. This is a case in which the fraudulent conduct of the trustee has rendered it impossible for the court, by the application of ordinary rules, to indulge any thing like a certain conviction that the injured party would receive adequate redress. Who shall incur the hazards which must result from the uncertainties and complication created by this fraudulent conduct? Shall the wrong-doer profit by them, or shall he be permitted to drag the court and the innocent party through all the mazes of his serpent-like course, in pursuit of justice—which pursuit may prove fruitless? Shall he do this, when the plain rule of restitution of the money and interest and quieting of his title, works perfect justice? Is the complainant to be deprived of his election?

GOLDTHWAITE, J.—The facts which, upon the bill, answer and evidence, we consider as established beyond all controversy, are, that, on the 16th of October, 1837, Gunn, the plaintiff in error, and Brantley, the defendant in error, made a joint purchase from Dozier Thornton, of the north half of section twenty-nine and the south half of section twenty in township twenty-one, and range twenty-seven, at the price of eleven dollars per acre; for which land said Thornton executed to them jointly his bond for titles; that about the time of this purchase, or soon after it, the parties agreed to divide the land, Gunn taking all south of Osenappa creek, containing four hundred and seventeen $\frac{7}{100}$ acres, and Brantley all north of the same creek, containing two hundred and twenty-three $\frac{3}{100}$ acres; that this division was made, and Gunn took possession of his portion; that the lands taken by each were to be accounted for at eleven dollars per acre; that, at the time of the purchase, Thornton received from Gunn, in part payment of the purchase money, a note on Townes & O'Brien, for $4057, and for the balance of the purchase money Brantley executed his notes, one for $1000, due December 25, 1837, and the other for $2075 70, due December 25, 1838, with Gunn as his security; that the

whole of the first note was paid, and on the second the amount of $700, in October, 1839; that, for the purpose of saving Gunn from any loss on account of his securityship, he was permitted to retain the bond for titles, and that subsequently, on December 7, 1838, Brantley, for the same purpose, transferred to him, by writing under seal, all his right, title and interest in said bond, until the balance due should be paid by him, and when paid, then, if Gunn had obtained titles to the land, he was to convey to Brantley the portion to which he was entitled under the division; that a judgment was obtained against Gunn and Brantley, for the balance due on the second note, and the land which the latter was to take under the division was levied on, by the direction of Gunn, and sold under execution, he having before the sale obtained title from Thornton to the entire tract, and at the sale becoming the purchaser, for the price of seven hundred and sixty dollars.

W think it clear, upon this state of facts, that Gunn, as soon as he obtained the legal title from Thornton, became the trustee for Brantley, as to the lands to which the latter was entitled under the division; and that by the agreement between them, as expressed in the instrument bearing date December 7, 1838, Gunn might look to that portion of the land, as a security against his liability for Brantley; and the rules which govern relations of this character are applicable in the present case. The mortgagee cannot sell the land, without first obtaining the decree of a court of equity upon a bill for a foreclosure; and as Gunn was, by the terms of the trust, only authorized to hold the interest of Brantley as a security, until the payment of the purchase money due by him, it would be in direct conflict with the well established principles of equity, to allow the trustee to deprive the *cestui que trust* of his equity of redemption, by the sale of the land without a decree of foreclosure, and, by becoming himself the purchaser, to create an interest adverse to the person for whom he is a trustee. Prevost v. Gratz, Peters' C. C. R., 364; Jenkins v. Eldridge, 3 Story's R., 81; Powell v. Williams, 14 Ala., 476. It is true, that in the case of a purchase by the trustee, the *cestui que trust* will be required to do what is equitable, by the repayment of the money actually paid;

and it is necessary, that a bill, the object of which is to set aside a sale made to the trustee, should contain an offer, or what is equivalent to an offer, to do this. But in the present case, the bill alleges that the rents and profits of the land are sufficient to reimburse Gunn, in the amount paid by him, and if not sufficient, the complainant offers to abide the decree of the court, which is equivalent to an offer to pay what may be found due; and the objection to the bill, by way of demurrer, upon this ground, cannot, therefore, be sustained.

Neither was it necessary that Thornton should have been made a party to the bill. He had made titles to the land to Gunn; had taken up his bond; and having thus divested himself of all interest in the subject matter of the suit, it was unnecessary for Brantley, who did not complain of his action in this respect, to bring him before the court as a party.

In relation to the assignments of error based upon the admission of various portions of the testimony of the complainant below, it need only be observed, that although it appears that the objections were made before the commissioner, by the endorsement of the objection upon the interrogatories, yet there is nothing in the record which informs us that they were insisted on before the Chancellor. If objections to testimony were taken before the master, and were overruled by him, they could only be brought before the Chancellor by exceptions, and unless this was done they must be considered as waived. So, if overruled by the commissioner, the objections must be regarded as waived, unless brought to the notice of the Chancellor by exceptions filed, or motion to suppress.

As to the statute of limitations the rule is, that in all cases of concurrent jurisdiction, statutes of this character are equally as obligatory in courts of equity as in the common law courts, 2 Story's Equity, § 1520; Maury v. Maury, 8 Porter, 211; and in many cases, mere lapse of time and the staleness of the claim, in cases in which the statute does not apply, will in equity constitute a defence. In such cases, courts of equity, says Mr. Justice Story, "act sometimes in analogy to the law, and sometimes upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands,

by refusing to interfere where there has been gross laches in prosecuting rights, or long or unreasonable acquiescence in the assertion of adverse claims." 2 Story's Equity, § 1520. In the case under consideration, the instrument which gave Gunn the right to hold the interest which Brantley had in the purchase was executed in December, 1838, and the bill was filed in November, 1847. The transfer is in reality an equitable mortgage, and the rule as between mortgagor and mortgagee allows the former to redeem, at any time within the period prescribed for the limitation of rights of entry and actions of ejectment. 2 Story's Equity, § 1028. Applying this rule in the present case, Brantley, under the analogies of the law as determined by the statute of limitations of this State, in relation to rights of entry and actions for the recovery of lands, (Clay's Digest, 327, § 83, 329, § 93,) would have had a clear right to redeem at the filing of his bill.

In relation to fraud: The bill charges that the two hundred and twenty-three acres of land were worth about twenty-five hundred dollars; that it only sold for seven hundred and sixty dollars at the sheriff's sale; that Gunn became the purchaser, and that it was in consequence of his fraudulent conduct and representations that it did not bring its value. The answer, however, positively and unequivocally denies the charge of fraud, and the testimony of the witness Griggs is the only evidence which is direct upon this point. This witness states, that he sold the land, that Gunn was present and took a deep interest in the sale, and that while Thornton was bidding he said to him, "that he need not run the lands, as his money was sure to him, and that all he, Gunn, wanted was, a title to the land." If the answer was not impeached, this evidence would not be sufficient to outweigh it. But we do not regard the answer as entitled to full credit; it is equivocal and evasive, in response to the original bill, in relation to the transfer of the bond, which, the complainant there charges, was made solely for the purpose of securing Gunn as the surety of Brantley; and in the answer to the amended bill, it is insisted "that the transfer was absolute, and the interest of the complainant in the land by said transfer extinguished." This is equivalent to a denial that the transfer was other than an absolute one, and is contradicted by the terms of the in-

strument itself, which was in the possession of Gunn for a long period. The rule is, that an answer contradicted in a material point loses its weight as evidence. Pharis v. Leachman, 20 Ala., 662, and cases there cited. The fact that the land was levied on by the direction of Gunn, and purchased by him at a price considerably under its real value, must also be taken into consideration, in connection with the evidence of the witness Griggs; and these circumstances, united with the impeachment of the answer in relation to the transfer, and the evidence of the witness referred to, are sufficient to establish the allegation of fraud, as charged in the bill.

The complainant is clearly entitled to a decree; but as the agreement between the parties was, that Gunn should be entitled to hold the lands, to indemnify him against his suretyship for Brantley, a decree could not properly be rendered, which would have the effect of changing the contract which the parties themselves have made. To give the land to Gunn, and require him to pay Brantley the amount of the purchase money which he has paid, would be to create a new contract. Brantley is entitled to the portion of the land which he was to take upon the division, all lying north of Osenappa creek, on the repayment of the amount which Gunn has paid. He is entitled to the rents and profits actually received during the time the latter has been in possession, as well as those which he might have realized by reasonable care and prudence, or by ordinarily good husbandry; and he is also entitled to full indemnification for the injury which the land has sustained by the unauthorized act of the trustee in possession. Gunn is not entitled to compensation for improvements made by him, under a title procured by fraud. Van Horne v. Fonda, 5 Johns. Chan., 388, 416.

The decree of the Chancellor must be reversed; and an account must be taken by the master, of the rents and profits of the two hundred and twenty-three acres from the first of January, 1841, with interest on the same each year, and also the consequential damages which have been done to the land by the plaintiff in error, by clearing the same; and the defendant in error, Brantley, must be charged with the amounts paid by Gunn, as security for the amount due from him for the purchase money of the two hundred and twenty-three

acres, and the costs of the suit at law, and interest upon such amounts from the time of payment by the plaintiff in error; also, the sum of three hundred and eighty-five $\frac{7}{100}$ dollars, with interest from December 7, 1838; and if such rents and profits, with the interest and damages, exceed the charge against the defendant in error, a decree must be rendered against the plaintiff in error for the excess, and the title to the two hundred and twenty acres decreed to Brantley. And if the charges against Brantley exceed the amount of the rents and profits and damages taken on such account, a decree must be rendered, that he pay the same within a short day, or that the two hundred and twenty acres of land be sold, and the proceeds applied to the payment of the same, with interest, and that he be forever barred by such sale of all interest or equity in the premises.

As to the costs in this court, we do not think the defendant in error without fault. He failed to make the payments which he agreed to make; he involved his security and subjected him to the inconvenience of making the payments which he should have made; and he has been anything but diligent in the prosecution of his rights. He must pay the costs of this court.

WALKER, Executrix, *vs.* GOODMAN & MITCHELL.

1. In an action on the case against attorneys at law for negligence and unskillfulness in the management of a suit, a count is sufficient which alleges, after stating defendants' professional character and retainer by plaintiff, that they conducted the suit so negligently and unskillfully, "in not having a certain writ of attachment, affidavit and declaration, before then prepared by the said defendants in the said action, prepared and drawn up and filed, and made out according to the laws of said State and rules of said court, that the said plaintiff, by the said neglect, unskillfulness and default of said defendants," &c "was hindered and prevented from recovering judgment," &c., "and was forced and compelled to release and dismiss the levy of said writ of attachment," &c., "by reason whereof, the said plaintiff has been prevented from recovering her demand," &c.
2. So also, a count which alleges, that the defendants, through want of care and skill, "did dismiss the levy of a certain writ of attachment," before that

time levied on the property of the defendants therein, "and did dismiss, relinquish and release all liens which had attached or accrued by virtue of said levy," &c., and that, by means of the unskillful and negligent management of the defendants, the plaintiff "lost her said demand, and the means of recovering and collecting the same," presents a substantial cause of action.

ERROR to the Circuit Court of Chambers.
Tried before the Hon. N. COOK.

FALKNER and RICE & MORGAN, for plaintiff in error:

For the sufficiency of the declaration, see 2 Chitty's Pleading, 371 to 375. That there is no misjoinder of counts, see Church v. Munford, 11 Johns. R. 479; Jones v. Conway, 4 Yeates, 109; 1 Chitty's Pleading, 201, note 1.

The declaration shows distinctly that the attachment was prepared by the defendants, as attorneys for plaintiff; and as they undertook to prepare the writ, they are liable to the plaintiff for any injury resulting from their unskillful preparation of it. Pearson v. Gayle, 11 Ala. 281.

The defendants are equally liable for the injury resulting from their unauthorized dismissal of the levy, and release of all liens created by the levy and garnishments upon the property of the defendant in attachment; and this liability is sufficiently shown by the second count.

ALLISON & BARNES and L. E. PARSONS, *contra:*

The contract with an attorney to collect money, does not impose on him an obligation to sue out an attachment. Such a process is unusual to enforce the collection of money. Clay's Digest, 54, § 3; Pitts v. Burroughs, 6 Ala. 733; Paley on Ageney (Dunlap's) 4 to 8.

The declaration against an attorney, for having failed to sue out a writ of attachment, or for having sued it out unskillfully, must show that he contracted to sue it out. 1 Chitty's Pleading, (7 Am. ed.) 153–4; Wilkinson v. Moseley, 18 Ala. 228; Myers v. Gilbert, ib. 467.

The declaration must show an injury, in a clear and distinct manner, so as to advise the defendant of what he is called upon to answer, that he may be enabled to make his defence. The declaration is fatal in this respect. 1 Chitty's Pleading, (7 Am. ed.) 244, 266, 273, 285, 287.

The first count is bad for duplicity, if the object is to charge

defendants with unskillfulness or negligence as to the declaration, and also as to the affidavit and attachment. 1 Chitty's Pleading, 252.

PHELAN, J.—This was an action on the case brought by plaintiff in error against the defendants, as attorneys at law, to recover damages occasioned, as it is alleged, by their want of care and skill in the management of a certain suit instituted by her against certain persons in the Circuit Court of Chambers.

The declaration contains two counts. In the first, after stating the professional character of the defendants, and their retainer by plaintiff to conduct the suit, it is alleged, that defendants conducted the suit so negligently and unskilfully, "in not having a certain writ of attachment, affidavit and declaration before then prepared by the said defendants in the said action, prepared and drawn up and filed, and made out according to the laws of said State and rules of said court, that the said plaintiff, by the said neglect, unskillfulness and default of the said defendants, &c., was hindered and prevented from recovering judgment, &c., and was forced and compelled to release and dismiss the levy of said writ of attachment, &c. By reason whereof, the said plaintiff has been prevented from recovering her demand," &c.

The second count alleges, that the defendants, through want of care and skill, "did dismiss the levy of a certain writ of attachment" before that time levied on the property of the defendants in the attachment suit; "and did dismiss, relinquish and release all liens which had attached or accrued by virtue of said levy," &c., "and that the said action afterwards became and was rendered wholly abortive, and of no avail;" and that, by means of the unskillful and negligent management of the defendants, the plaintiff "lost her said demand and the means of recovering and collecting the same."

There was a demurrer to each count in the declaration, and also to the whole declaration, which demurrers the court below sustained, and gave judgment for the defendants. This decision of the court is assigned for error.

Both counts of the declaration present a good cause of action. It may not be the strict professional duty of an attor-

ney, to prepare or supervise the preparation of an affidavit for an attachment, or a writ of attachment; but if he does undertake to do so, and does it so negligently or unskillfully that his client in the progress of the cause suffers an injury, by reason of such want of care and skill, the attorney is liable to an action. That it is the attorney's duty to prepare a declaration admits of no question; and here the allegation of neglect and want of skill embraces as well the declaration as the affidavit and writ. This made it sufficient, if the other words did not.

Whatever may be said of the first count, I can see no sort of objection to the legal sufficiency of the second. The allegation is, that defendants having been retained as attorneys to prosecute an attachment suit, for want of care and skill "dismissed the levy of the attachment," and "released and relinquished all liens which had accrued by reason of such levy," by which plaintiff "lost her demand and the means of recovering the same." This count undoubtedly presents a substantial cause of action against an attorney for negligence. The degree of negligence necessary to charge him is a question of fact for the jury. 2 Por. 205.

The court below erred in sustaining the demurrer to the whole declaration, and to each count.

Let the judgment be reversed, and the cause remanded.

LANKFORD *vs.* JACKSON ET AL.

1. A court will never permit its process to be improperly used, to work injustice or oppression; but if such use be made of it, the court will, by virtue of its power over its officers, suitors and counsel, rectify the abuse, and restore to the injured party that of which he has been deprived by their fraud, negligence or misconduct.
2. The sheriff should not sell property levied on under *fi. fa.* for a merely nominal sum, (as where land worth $1000 was sold for $6,) but should retain the levy and return the *fi. fa.*, stating the facts; but if he disregards his duty and sells the land for a nominal price, the court, on timely application, will set aside the sale.

ERROR to the Circuit Court of Cherokee.

Tried before the Hon. GEORGE GOLDTHWAITE.

MOTION by the plaintiff in error to quash an execution, and set aside a sale of land made under it by the sheriff. The land was proved to be worth $1000, and was purchased at the sale, by the attorney of the plaintiff in execution, for $6.

WHITE & PARSONS, for plaintiff in error:

The sale should have been set aside. It was the duty of the sheriff, to return the *fi. fa.* stating the levy, and that the land was "not sold for want of bidders." Powell v. Governor, 9 Ala. 39; Watson on Sheriffs, 190; Keightley v. Birch, 3 Campbell, 521; Leader v. Danvers, 1 Bos. & Pull., 359. The case of Lee v. Davis, in 16 Ala., does not preclude this argument.

J. B. MARTIN and S. F. RICE, *contra:*

To authorize a sale of land under execution to be set aside, there must have been, at the time of sale, fraud, irregularity or mistake prejudicial to the rights of the party who makes the motion. Mobile Cotton Press v. Moore & Magee, 9 Porter 679; Drane & Smelser v. Henderson, 15 Ala. 423. Inadequacy of price is not a sufficient reason for setting aside the sale; especially since the enactment of our redemption law, which prevents a high price. Powell v. Governor, 13 Ala. 516; 6 Watts 140; Litt. Select Cases 256; 3 Monroe 273; 5 Howard's (Miss.) R. 253.

In those cases where sales have been set aside, because the plaintiff's attorney became the purchaser, it was shown that the attorney had controlled the execution and managed the sale; this was not shown here. It is settled in this State, that an attorney, administrator or agent may purchase on his own account, provided the sale be free from fraud. Lee v. Davis, 16 Ala. 516.

There was a judgment with proper parties, in full force, on which the plaintiff had a right to issue execution to enforce its collection, unless arrested by defendant; and the execution being regular on its face, the sheriff was bound to obey its mandate, by proceeding to execute it. Cogburn & Powell v.

Spence, 15 Ala. 549; Bibb v. Powers, 7 ib. 658; 7 Metcalf 257; 8 ib. 102; 4 Taunt. 631.

No decree of final discharge in bankruptcy had been rendered at the time of this levy and sale, and it could not then be known that such decree would ever be rendered; the sale, then, was regular and the title passed to the purchaser, 17 Ala. 344; 7 ib. 958. The subsequent quashing of the execution and setting aside of the levy, will not affect the title of the purchaser, unless he had notice of the irregularity when he purchased: which is impossible here, the decree of final discharge having been rendered *after* the sale. Chambers v. Stone, 9 Ala. 260; Nuchols v. Mahone, 15 ib. 212.

The irregularity which will authorize the setting aside of a sale on motion, must exist at the time of the sale. McCollum v. Hubbert, 13 Ala. 289; 15 ib. 214.

The defendant in the execution might have protected himself by an injunction, which would have secured both parties. See Moseley v. Steele & Metcalf, 7 Ala. 299, which is decisive of this. Failing to enjoin, is a want of reasonable diligence, and bars his motion. Johnson v. Johnson, 5 Ala. 97, and cases there cited.

CHILTON, C. J.—This was a motion by Lankford to quash an execution, and set aside a sale made under it, of a certain tract of land, by the sheriff.

It appears, that the judgment under which the land was sold, was rendered on the 12th May, 1840, and the sale was made in April, 1843; that Lankford filed his petition in bankruptcy on the 16th May, 1842, was declared a bankrupt by the decree of the District Court in November of that year, and finally discharged on the 18th May, 1843. The land was purchased between the decree declaring him a bankrupt and his final discharge, and was levied upon and sold, as his property, for the sum of six dollars, and purchased by the attorney of record of Jackson, the plaintiff in execution. The land is proved to have been worth at the time of the sale one thousand dollars, and it is stated in the bill of exceptions that on the day of sale, "it was talked of and generally understood that the said defendant in the execution had filed his petition in bankruptcy."

The Circuit Court quashed the execution, and refused to set aside the sale, and this refusal to vacate the sale is the matter we are called on to revise.

We pass by the consideration of the question, whether it was the duty of the court, after having held the process irregular, to have proceeded and placed the parties in *statu quo*, by ordering the deed to be canceled and the sale vacated, unless it had been shown that this could not have been done, by reason of some change in the condition of the parties, predicated upon the validity of the sale; as for example, valuable improvements made by the purchaser, or a sale and conveyance to another person, as upon a redemption by a judgment creditor, &c. We prefer to rest our decision upon another ground, which is this: The land was worth one thousand dollars; it sold for six dollars only. Ought the court to hold such a sale valid? A court will never lend its process, or permit it to be improperly used to work injustice or oppression, but if such use be made of it, the court will, by virtue of its power over its officers, suitors and counsel, rectify the abuse and restore to the party injured that of which he has been deprived, either by the fraud, negligence or misconduct of its officers.

In the case before us, a valuable tract of land is sold by the officer of the court, under irregular process of the court, for a mere nominal sum—six dollars—a sum, perhaps, which is not sufficient to pay the cost or expense of levying upon, advertising and selling it. Under such circumstances, we do not hesitate to hold the sale to be invalid, and that it was the duty of the sheriff to have returned the execution, levied on the land which remained unsold for the want of bidders. To hold otherwise would be, in our opinion, to sanction the grossest injustice. This view is sustained by the adjudged cases, as well as the elementary writers. Keightley v. Birch, 3 Campbell 520; Leader v. Danvers, 1 Bos. & Pul. 359. See also Powell v. The Governor, 9 Ala. 39.

Mr. Watson says: "Although goods are put up to sale by public auction, yet if they are sold for much below their real value, the sheriff is liable to an action; for in such case he should wait for a *venditioni exponas*." Watson on Sheriffs, 188.

Mr. Sewell, in his treatise on the Law of Sheriffs, says: "If a very inadequate price be offered for the goods, the sheriff should not sell them, but should return that they remain on his hands for want of buyers, and wait till he has been served with a *venditioni exponas*, under which he will be obliged to sell them for whatever price may be offered;" citing the case of Keightley v. Birch, *supra*, and Barrard v. Lee, 1 Stark. Rep. 51. See also remarks of Lord Ellenborough in 9 East 298.

It is manifest that no general rule can be laid down defining the cases in which the court will interpose in this summary way. One thing, however, is certain, the sheriff upon a *fieri facias* should not sell the property levied on by him for a merely nominal sum, whether the property consists of personal goods or real estate, but should retain the levy, and return the *fi. fa.*, stating the facts. If, however, he does so disregard his duty as to sell property worth one thousand dollars for six, whereby the plaintiff gets nothing upon his debt, and the defendant is despoiled of his goods, or deprived of the title to his land, the court, on timely application, should hold the sale invalid, and order restitution to be made.

Let the judgment be reversed, and the cause remanded, that proceedings may be had in conformity to the principles above declared.

JONES *vs.* GRAHAM.

1. Previous to the passage of the act of March 6, 1848, (Pamphlet Acts 1847–8, 121,) the physician of the penitentiary could only be removed by the inspectors, and the lessee could not avoid his liability to pay the physician's salary, by refusing to admit him into the hospital; during the physician's continuance in office, he had the right to demand and recover of the lessee a fourth part of his salary, at the end of every three months' service, notwithstanding the latter hindered him from the discharge of his official duties.

ERROR to the Circuit Court of Coosa.

Tried before the Hon. GEORGE GOLDTHWAITE.

The plaintiff in error brought ASSUMPSIT against the defendant, to recover five hundred dollars per annum for two year's services as physician of the penitentiary, the defendant being lessee of that institution during the whole period for which the plaintiff was elected physician.

The declaration contains three counts, two of them special, and the third, general *indebitatus assumpsit.* The defendant demurred, but the demurrer was overruled, and the parties went to trial on the general issue, when there was a verdict for the defendant.

The first count in the declaration sets out, that the defendant was lessee of the penitentiary in February, 1848; that a vacancy existed in the office of physician, and defendant failed to fill it within three days after it occurred; that after three days the inspectors of the penitentiary proceeded to fill it by appointing the plaintiff, who accepted the office, of which the defendant had notice; that he entered upon and discharged the duties of said office for a long time, to-wit: for the space of ; that he has been ever ready, since his appointment, to perform all the duties of his office, and attended at the penitentiary, and offered to fulfil and perform said duties. It is further averred, that the defendant would not permit or suffer the plaintiff to perform said duties, or any part thereof, but hindered and prevented him from so doing; and has continued to prevent and hinder him for the space of two years, during all which period plaintiff was ready and willing to perform his duties as physician, and was not removed from his office. "By means whereof the said defendant became liable to pay the said plaintiff the sum of one thousand dollars, and being so liable in consideration thereof," &c., concluding with the usual *super se assumpsit.*

The second count sets out the appointment of the plaintiff to the office of physician of the penitentiary, the lesseeship of the defendant, and the hindrance interposed by defendant to the discharge of the duties of physician by plaintiff, precisely as these facts are set out in the first count, and differs from that count only in this: that it avers his office continued for one year and a half; that the salary is $500 per annum, payable in instalments of $125 at the end of every three months during the time.

The third count is general *indebitatus assumpsit* for work and labor done, &c.

On the trial, as appears by the bill of exceptions, the plaintiff proved his appointment to office on the 7th of February, 1848, as it was laid in the declaration; that the defendant was lessee at that time, and continued such until the institution of this suit; that the plaintiff accepted the appointment, and proceeded to fulfil and discharge the duties of said office, and did discharge them with skill and diligence, and did so discharge them until the 18th of February, 1848, when, on presenting himself at the penitentiary and asking admittance into the hospital, it was refused him by the lessee, and plaintiff was thus hindered from performing his duties, and was so hindered by the defendant up to the 20th of August, 1849; that plaintiff held himself ready to discharge the duties of his appointment from the time it was made for the term of two years, but was prevented by defendant from doing so; that he had never been removed from office, either by the inspectors of the penitentiary, the General Assembly of the State, or the Governor, and that he was regularly licensed as a physician.

The court charged the jury that the plaintiff, upon this evidence, was not entitled to recover; to which the plaintiff excepted, and the charge is here assigned for error.

ELMORE & YANCEY, for plaintiff in error:

1. On the facts set forth in the declaration the law created the whole contract between the parties and implied every promise on the part of either, and it was unnecessary to state that which the law implied. The plaintiff proved every allegation in the special counts, and was entitled to a recovery. Clay's Digest, 396–7, §§ 1, 3, 5 8; Chitty's Pleading, 302, 305, 313, 316, 317, 332; 2 Porter, 542; 7 Cranch, 408; 2 Har. & Gill., 183.

2. If the facts proved did not authorize a recovery, it was because the facts alleged in the declaration were insufficient. But the defendant could not take advantage of this defect by a charge to the jury. He must demur or move in arrest of judgment.

3. Assumpsit was the proper remedy. The law created

the contract and implied the mutual undertakings, and the plaintiff is not restricted to any other particular remedy. 1 Chitty, 106; Bear Camp River Co. v. Taylor, 6 N. Hamp., 499; Andover & Medford, T. Co., v. Gould, 6 Mass., 40; Chesley v. Smith, 1 N. Hamp., 20; Paulett v. Sandgate, 19 Vermt., 629; Brookshire v. Westminster, 4 Vermt., 224; Peck v. Wood, 5 D. & East, 130.

4. It is sufficient to state the facts which the statute renders necessary to create the liability, and thereupon the assumpsit is implied. When the plaintiff shows a legal right, this implication is greatly favored. Danville v. Putney, 6 Vermt., 512; Bell v. Burrow, Bul. N. P., 129; Rann v. Green, Cowper, 474; Simpson v. Johnson, (note 2,) Douglass, 10; Westmoreland v. Davis, 1 Ala., 301; 2 Starkie on Ev., 101, 109; Miller v. Creyon, 2 Brevard, 108.

5. If one is employed for a certain period and for a certain sum, and is discharged without good cause before the termination of his employment, he may sue forthwith and recover the damages developed up to the time of trial. Sprague v. Morgan, 7 Ala., 952; Davis v. Ayres, 9 Ala., 292; Martin v. Everett, 11 Ala., 375; Ramey v. Holcombe, decided June term, 1852.

6. The plaintiff is not restricted to a suit on the bond. This is a collateral security only, as attachment bonds, sheriff's bonds, &c. The right of action is not merged in the bond therefore. 1 Chitty.

7. Debt could not be maintained, because that is for a sum of money *eo nomine et in numero.* The breach of the contract is the injury complained, and damages are sought for this injury.

8. Case might be maintained, but only for the same reason that assumpsit can, to-wit: in the one case the law creates the obligation or duty, and the breach of that duty is the injury. In the other, the law on the same state of facts creates the promise, and the breach of the promise is the injury complained of. Chitty, 135, 144.

9. On an award to do any act, except to pay money, assumpsit only can be maintained, unless there was a submission by bond. When there is a deed between husband and trustee, that the husband shall pay an allowance for the wife,

and the trustee furnishes her with necessaries, he may sue the husband in assumpsit on the common law obligation, and need not resort to the covenants in the deed. 1 Chitty, (and cases in note q,) 103; 1 Chitty, (and cases in note b,) 104; 1 Chitty, (and cases in notes 1 and m,) 109.

10. The plaintiff, at all events, was entitled to recover his first quarterly salary, as on instalments. Davis v. Preston, 6 Ala., 83; 1 Chitty, 102.

WHITE & PARSONS, for defendant in error:

1. There is no express promise proven, and we insist that the law does not imply one from the facts in evidence; and the action of assumpsit cannot be maintained, except upon a promise, express or implied. Charleston v. Stacy, 10 Vermt., 563; 1 Chitty's Pleading, 137; McMillan v. Eastman, 4 Mass., 378; 2 East, 505; Law Lib., Vol. 19, page 53 and notes.

2. This is a breach of duty, and the only remedy is in case, unless the suit be on the bond. 17 Ala., 51; Wilkerson v. Mosley, 18 Ala., 290. Assumpsit cannot, in general, be supported when there has been an express contract under seal; such, for instance, as the bond required of the lessee. 14 Mass., 95; Chitty's Pl., Vol. 1, page on the margin 103; 4 Cranch, 239.

3. The lessee is required to give bond and security in $25,000, "payable to the State of Alabama." Acts 1846, 12, § 10; and by the eighth section of the same act "the lessee shall defray all the expenses, (including the pay of the physician,) and he and his securities on the bond shall be responsible, and the bond may be sued on at the instance of any person interested. Suppose a sheriff should fail to make the money on an execution, would he be liable in an action of assumpsit? If he would not, upon what principle can the defendant be in this case?

Where there is an express promise to A, will the law raise an implied promise, from the same facts, to B, to discharge the same debt or duty?

LIGON, J.—The only question presented on the record for our consideration arises on the charge of the court below, and

is this, does the proof set out in the bill of exceptions authorize a recovery?

There can be but little doubt that it does. Not, indeed, for the full amount claimed in the declaration, but to some extent, which the jury alone could ascertain from the proof. The plaintiff proved that he was regularly appointed physician to the penitentiary on the 7th February, 1848, and that he regularly discharged the duties of his office until the 18th day of that month, when the defendant hindered him from further performance by refusing him admittance into the hospital; that he continued afterwards ready to perform such duties, and offered to do so, but was still hindered by defendant, who was lessee of the penitentiary. He further proved that he had never been removed from office, either by the inspectors, the General Assembly, or the Governor.

The rights and duties of the physician and lessee of the penitentiary, at the time of the appointment of the plaintiff to the former office, were, in one respect, essentially different from what they were at the commencement of this suit. By the law, as it then stood, the physician was to be appointed by the lessee, with the advice and consent of the inspectors; and if, on the happening of a vacancy, the lessee failed to fill it in three days, it became the duty of the inspectors to do so the fourth; and to the inspectors alone was given the power of removal, which might be exercised when it was ascertained that the appointee was incompetent, or had neglected his duty. Sess. Acts 1847–8, 126. Under this act, the plaintiff was appointed to office by the inspectors. The salary of the physician was fixed by law at $500, payable quarter yearly. Clay's Dig., 397, § 6. And the lessee was required to pay it. Sess. Acts, 1845–6, 11, § 8.

The law imposes the duty on the lessee to pay to the physician a stipulated amount, at set times; and when the plaintiff was duly appointed to office on the 7th February, 1848, he had the right to demand and recover of the defendant a fourth part of his salary at the end of every three months' service during his continuance in office, and proportionably for a shorter period, if not removed from office; and this, notwithstanding the defendant hindered him from the discharge of his official duties.

At the time the plaintiff was appointed, the defendant had no power to remove him. The latter could not avoid his liability to pay the salary of the former, by refusing to admit him into the hospital. So long as the plaintiff remained in office, untouched by those who had the legal power to remove him, he was entitled to his salary, and had the right to recover it of the defendant, so soon as it was due under the statute. No express promise to pay it, on the part of the defendant, is necessary, to render the plaintiff's right of action complete, and consequently there was no necessity to prove one on the trial. The law creates the liability of the defendant, and implies a promise to pay the plaintiff his salary as physician.

Thus stood the law regulating the rights and liabilities of the parties to this record, until the 6th of March, 1848. On that day the Governor approved an act passed by the General Assembly, giving the lessee the power to remove the physician of the penitentiary from office. Sess. Acts, 1847–8, 121, § 1. How far this act will affect the rights of the plaintiff, who had been appointed to office before its passage, or what act on the part of the lessee, if any, would amount to a removal from office, we do not now decide, as these questions were not discussed before us; but it is certain, that a refusal by the lessee to admit the plaintiff into the hospital on the 18th February, 1848, the time it was proved to have happened, could not have that effect, because, at that date, the lessee did not possess the power of removal. The question of the time when the removal took place, if at all, should have been left to the jury, as well as the sum due the plaintiff at the time of such removal.

In the aspect in which this case is presented by the assignment of errors, we are relieved from all inquiry as to the form of action. Legitimately we can only examine the charge of the court in reference to the proof set out in the bill of exceptions, as this alone is assigned for error. This we hold to be erroneous.

Let the judgment be reversed, and the cause remanded.

COMMISSIONERS' COURT OF TALLAPOOSA *vs.* TARVER.

1. On motion for *mandamus*, the return which is made to the alternative writ is not required to be verified by the oath of the party; it is taken as true by the court, and, in the absence of any statute providing for traversing the return, the party injured must proceed for the false return, and if it be found false by the jury, he recovers damages equivalent to the injury sustained, together with a peremptory *mandamus* to the defendant to do his duty.
2. The statute allowing the defendant to plead as many matters as he thinks necessary to his defence, applies to proceedings by *mandamus*, as well as to other causes at law.
3. The statute of Anne ch. 20, which allows the facts stated in the return to the alternative writ in cases of *mandamus* to be traversed and tried by a jury, not being in force in this State, the facts must be pleaded with such a degree of certainty, as to enable the court to decide whether they are in law sufficient to justify the party in failing to do the act.
4. Where commissioners are appointed, under an act of the Legislature, to contract for and superintend the erection of county buildings, the acts of the majority, in making the contract and receiving the buildings, are binding on all; but one cannot be held responsible for the acts or defalcations of the others.
5. The act of 1843 (Pamphlet Acts, 134) authorizing the Commissioners' Court of Tallapoosa to levy a county tax for the purpose of discharging the liability previously incurred by certain commissioners appointed under acts of the Legislature, to contract for the erection of certain county buildings, was intended to cover the liability legitimately incurred by them in the discharge of their public duties; and counsel fees incurred by them, acting in good faith, in the defence of a suit instituted against them by the contractors, properly constitute a part of that liability.
6. Before the Commissioners' Court could be compelled to levy the tax authorized by the act of 1843, it was the duty of the relator to prove to the court the extent of the liability incurred by him, as one of said commissioners, in the discharge of his official duties; and an answer averring that said court had refused to make the appropriation to meet his liability, because he had never afforded to the court any proof or information as to the extent of his liability, is a sufficient answer to the alternative writ issued to them, on his application for a *mandamus* to compel them to levy the county tax.

ERROR to the Circuit Court of Chambers.

This was an application by the defendant in error for a *mandamus* against the Commissioners' Court of Tallapoosa, to compel them to levy a tax under the act of 1843, (Pamphlet Acts, 134,) to discharge the liability incurred by the rela-

tor, who was one of the commissioners appointed under a previous act of the Legislature to contract for and superintend the erection of a court-house and jail in Tallapoosa. This liability consisted of a judgment rendered against the relator and some of the other commissioners, in favor of the contractors, and counsel fees incurred by them in the defence of the suit. The petition, in addition to the above facts, alleged that the relator had faithfully applied all the public funds in his hands to the extinguishment of this debt; that he had repeatedly made application to said Commissioners' Court, and that said court had made a partial payment on said judgment, but refused to pay the balance, or to refund to the relator the amount paid by him out of his private funds, or the amount for which he has become individually responsible in the defence of said suit.

A rule *nisi* was granted against the said Commissioners' Court, who afterwards appeared by attorney, and demurred to the petition. The court sustained the demurrer, and dismissed the relation; but its judgment was reversed by the Supreme Court, on writ of error. See 17 Ala. 527.

The Commissioners' Court then filed an answer to the petition, alleging in substance:

1. That the said court-house and jail were insufficiently built, and ought not to have cost more than the sum of money which was contracted to be paid for them; that the county ought not to pay more than they were really worth; that if they were built according to contract, the court-house commissioners acted in bad faith; and if they were not built according to contract, they ought not to have been received; that the relator and the other commissioners had received all payments to which they were justly or legally entitled, having received upwards of the sum of $18,000;

2. That said relator and the other commissioners had sold and disposed of lots in the town of Dadeville, amounting to $18,000, and upwards, which sum was the appropriate fund for erecting said county buildings, and was sufficient for that purpose; that this sum should have been appropriated to that object, before the said commissioners or relator could of right call upon the county for an appropriation; that said commissioners and relator wholly failed and neglected to ac-

count for this sum, and therefore nothing is due to them; that they have received from the sale of said lots full satisfaction and indemnity for all liability incurred by them in the erection of said county buildings;

3. That neither the relator nor the other commissioners are entitled to counsel fees, or costs, or expenses incurred by them in defending said suit, for the reason that they acted upon their own responsibility in submitting to a lawsuit;

4. That upon an examination of the records, files and dockets of the said Commissioners' Court, no evidence whatever could be found of any motion, petition or application of any kind, by the said commissioners or relator, for an appropriation for the payment of said judgment, or of said fees, costs or expenses of suit, or any demand of any kind whatever; nor could any evidence of any demand or account be found, although said commissioners were required to file the same; and that, therefore, no legal or proper application had in fact been made, and that said Commissioners' Court had never refused to make appropriations, and to levy and collect taxes for the liabilities incident to the erection of said county buildings, on any proper application and proof by said relators and said commissioners:

5. That said Commissioners' Court had levied and collected taxes, and paid over to said relator, or to the satisfaction of said judgment, the full amount for which the county is or ought to be responsible:

6. That said Commissioners' Court had always been ready to levy and collect taxes, and pay the necessary expenses of erecting said court-house and jail, and to pay said relator and other commissioners all moneys necessarily laid out by them in the erection of said buildings, whenever the said relator or commissioners would make out and present to said court a fair account and exhibit of their transactions as such commissioners, and present his or their demand, properly and legally proved, which said relator has neglected and refused to do: and that said court has never refused to levy and collect taxes for the relief of said relator and the other commissioners, upon a proper application and proof of their demand:

7. That the relator had never presented or proved any demand, for liabilities incurred by him in the erection of said

court-house and jail, to the said Commissioners' Court, for allowance or payment; that if said court had ever refused to make such allowance or appropriation, it was because there was no evidence of any debt or liability of any character presented to said court, by or in behalf of said relator, nor any evidence of any liability on the part of the county to pay the same.

This return was made in the name of the said Commissioners' Court, and was verified by the oath of one member of that court. On motion of the said relator, the return was quashed, and judgment was rendered awarding a peremptory *mandamus*. The quashing of the return, and the awarding of a peremptory *mandamus*, are now assigned for error.

BELSER and LEFTWICH, for plaintiffs in error:

1. The various acts of the Legislature, touching the authority of the commissioners to sell the lots, collect the money and have the court-house and jail constructed, are contained in the following pamphlets: Acts of 1833, p. 49; ib. 1834, 95; ib. 1841, 130; ib. 1843, 134.

2. These several acts have been reviewed in the present case, at a former term of the court, and, on demurrer, the relation of Tarver on its face was held valid; the court leaving for after consideration the merits of the question. Tarver v. Com'rs &c., 17 Ala. 530.

3. The truth of the respondents' return is never allowed to be controverted, and the court will not enter into an inquiry to ascertain the truth of the facts set forth in it; but if incorrect, the aggrieved party will be left to his action for a false return. Board v. Grant, 9 Sm. & M. 77; State v. Bridge Co., 3 Harr. 540; Brosius v. Beuter, 1 Harr. & Johns. 551.

6. The response of the defendants to the plaintiff's relation, embraces several grounds of defence, which are distinctly set forth in it. The quashing of the relation was erroneous, and the court, on the relation and answer, should not have quashed the latter nor ordered the *mandamus*. The relator had another remedy. Spring. v. Hampden, 10 Pick. 59; Justices v. Hoodenpyle, 7 Hump. 145; People v. Mayor, 25 Wend. 685.

7. A return is sufficient, if it contains a full and certain answer to all the allegations expressly made, and discloses a

fair legal reason why the *mandamus* should not be obeyed. Springfield v. Hampden, 10 Pick. 68; King v. Arch Bishop, 6 Term 495; King v. Lyme, Doug. 159; Brosius v. Beuter, 1 Harr. & Johns. 557.

8. The Commissioners' Court should have been called on to audit the claim of Tarver, before it could be called on to make the allowance. Falkner v. Judge, 19 Ala. 177; Clay's Digest, 192, §§ 1, 2; ib. 578, §§ 12, 13.

9. In all such cases, the relator holds the affirmative. People v. Throop, 12 Wendell, 183.

10. The pleadings in the case on the part of the defendants, are not contradictory. There is no one defence which substantially denies the other. Besides, a defendant now can interpose as many pleas as he thinks proper, in any case at law. Springfield v. Hampden, 10 Pickering, 68; Clay's Dig. 332, § 109; Bank of Albany v. Canal Com., 10 Wendell, 25; Rex v. Dullen, Com., Beatty's Rep. 628.

11. By the statute, the duty which is to be performed by the Commissioners' Court, is more than a mere ministerial duty. It is a judicial one; and if a judicial one, the *mandamus* must be refused. Clay's Digest, 142, §§ 1, 2; ib. 578, §§ 12, 13; 19 Ala. 177; Decatur v. Paulding, 14 Peters, 514; see Acts 1841 and 1843.

FALKNER, RICE and PARSONS, *contra:*

The first assignment of error cannot be sustained. When this case was here at a previous term, this court decided that the petition was sufficient to entitle the defendant in error to the relief prayed for. See Tarver v. Com. Ct., 17 Ala. 527.

The second assignment of error cannot be sustained; because, on motion, both parties had leave to amend pleadings, without objection, and it seems to have been granted at the instance of both parties, and both parties have availed themselves of the leave granted; the plaintiffs in error, therefore, cannot be heard to object on this ground. The return was not sufficiently verified. 1 Kelly's R. 271.

The third assignment of error is disposed of by the previous decision of this court in this case. (17 Ala. 527.) This court will presume that the amendment was verified, nothing to the contrary appearing in the record, and no objection be-

ing made at the time the amendment was made on that ground. It being made in open court, this court will presume that the Circuit Court did its duty in requiring the amendment to be presented in a proper manner.

The fourth assignment must fail; the return not being certain to any certain intent, and being argumentative and not stating facts, and showing no good cause why the writ should not be granted, was properly quashed. See Bouvier's Bacon's Abridgment, 447, 448, 449, and authorities cited; 9 U. S. Digest, (1849) p. 327, § 13.

The judgment was rendered on proper proof made to the court, the defendants below declining to plead or answer over, and ascertains particularly the plaintiff's demand. In these cases the proper judgment is, that a peremptory *mandamus* issue. County of Pike v. The State, 11 Illinois, 262; 11 B. Monroe, 143; 31 Maine, 272.

That the answer or return of defendants is insufficient and otherwise defective, and was properly quashed by the court, see Commercial Bank of Albany v. Canal Commissioners, 10 Wendell, 25, and authorities cited, which is believed to be conclusive; see, also, 6 Bacon's Abr. 447.

As to the appointment of the court-house and jail commissioners, (of whom Tarver was one,) see Pamphlet Acts 1841, p. 130.

That the Commissioners' Court has no discretion in levying and collecting and appropriating the amount of the judgment and other expenses, see Pamphlet Acts of 1843, 134, and 17 A. R. 527, where said act is construed.

The copy of the order of the Commissioners' Court, appended to both the petition and the return, by which they refuse to pay more than the sum there appropriated, is a positive refusal to pay the balance of said judgment, and falsifies other parts of the return.

The whole return is contradictory, and according to the rule in Bacon, (above cited,) was properly quashed. 6 Serg. & R. 469; 1 ib. 254.

The fund arising from the sale of town lots, is appropriated to the benefit of the town of Dadeville. See Pamphlet Acts, 1844–5, p. 51.

The exhibits attached to the return sustain the relation,

and utterly overthrow the averments contained in the seventh ground taken in the return. They show that a demand was made, that proof was made, and that the court acted on it.

GOLDTHWAITE, J.—The act of the Legislature of the 13th of February, 1843, (Acts 1843, 134,) which provided that it should be lawful for the Court of Commissioners of Roads and Revenue of the county of Tallapoosa to impose such a tax, in addition to the tax laid for county purposes, as should be necessary to pay any amount of money that the court-house commissioners should be liable to pay for building a court-house and jail in said county, was construed by this court on a previous adjudication of this case (17 Ala. 527) as compulsory on the Commissioners' Court of Tallapoosa county, to levy the amount required to discharge the liabilities of the court-house commissioners; and it was also held, upon demurrer to the petition of the relator, that sufficient appeared upon the face of the petition to entitle him to the relief sought.

The only question now presented is, as to the sufficiency of the return; and it is insisted in argument, that the return is insufficient in not being verified by the oaths of all of the defendants. This objection cannot prevail. The return which is made to the alternative writ we do not understand is required to be verified by the oath of the party. It is taken as true by the court; and, in the absence of any statute providing for traversing the return, the party injured must proceed for the false return, and if found to be false by the jury, he recovers damages equivalent to the injury sustained, together with a peremptory *mandamus* to the defendant to do his duty. 3 Black. Com. 111.

Several distinct and separate grounds are taken in the answer, as a justification on the part of the defendants below in not levying the tax; but there is no error in this, as the statute (Clay's Dig. 332, § 109,) allows the defendant, in all cases, to plead as many matters as he thinks necessary to his defence; and we see no good reason why this act should not apply to proceedings by *mandamus*, as well as to other causes at law. The terms are broad enough to admit of this construction, and the evils which were intended to be removed by its enactment would be but partially suppressed, if the

beneficial operation of the statute was to be confined to common law actions commenced by original writ. The same reasons exist for its application to cases like the present, as in other cases at common law. If, therefore, any one of the grounds which have been taken by the defendants below would, of itself, be a sufficient answer to the petition, it follows, that the writ should not have been allowed, and that the judgment of the court below, in quashing the return, was erroneous.

In relation to the degree of certainty which is required in the pleadings in cases of *mandamus*, the English rule has been somewhat relaxed since the statute of Anne, ch. 20, which allows the facts stated in the return to be traversed and tried by a jury. 1 Evans' Stat. 176; Stephens' Nisi Prius, 2330; but, as in this State no such statute is in force, the facts must be pleaded with such a degree of certainty as to enable the court to decide whether they are, in law, sufficient to justify the party in failing to do the act.

Under the rules we have laid down, that portion of the return which goes to the insufficiency of the buildings cannot be sustained. The act of 1843 was passed after the liability of the commissioners accrued, and that liability, as the petition alleges, was fixed by the judgment; but independently of this, there is nothing stated in this head of the answer that shows with certainty and precision that the relator was not liable. The contracts may have been entered into, and the court-house and jail received by the other commissioners, and in relation to duties of this character the acts of the majority are binding. Caldwell v. Harrison, 11 Ala. 755. But again, there is no averment as to what the buildings were actually worth; no averment of the precise amount which the relator or the other commissioners have received. It would be impossible to render a judgment upon a plea as defective as this is.

The second head is equally defective. There is no principle upon which the relator could be held responsible for the acts or defalcations of the other commissioners. Independent of the manifest injustice which would be worked, it would be difficult to find any person, if this construction was to prevail, who would take upon himself public duties in connection with

others. If the other commissioners received any portion of the proceeds of the lots, and failed to apply them to the erection of the public buildings of the county, as they were by law required to do, it furnishes no reason for failing to levy the tax which was necessary to discharge the liability of the relator, leaving it to the county to assert its claim against the defaulting commissioners in the manner provided by law. Clay's Dig. 578, § 15. It is not alleged, that the relator has collected a sufficient amount of the funds provided for the erection of the county buildings to pay for the same; but the averment is, that that amount has been collected by him or the other commissioners, and the amount which it is averred has been collected is not stated. Unless the amount has been received by the relator, it is not an answer to the application.

The third ground which is taken is, that the relator is not entitled to fees, costs or expenses for the defence of the suit. If the commissioners, acting in good faith, regarded it as necessary to defend the suit commenced against them, it was their duty so to do; and the expenses legitimately incurred in the discharge of their public duties, properly constitute the liability intended to be covered by the act of 1843; and such we understand to have been the decision of this court when the case was last before it. 17 Ala. 527.

The fourth, fifth and sixth grounds, as stated in the answer, are also defective; the fourth being entirely inferential, in drawing the deduction that no account had been presented, from the fact that no evidence, petition or motion was to be found upon the files of the court, the averment in substance being simply, that no proper application had been made; while the other two are defective in that degree of certainty which is required, as well as in stating legal conclusions rather than facts.

The seventh and last ground of the return, however, we consider as well taken. By the act of 1843, before referred to, it was made the duty of the Court of Commissioners of Roads and Revenue of Tallapoosa county to impose a tax sufficient to discharge the liability of the court-house commissioners of that county; but in order to impose this tax, it was necessary that the court should be advised of the extent of the liability which the tax was intended to meet. The ac-

tion of the court-house commissioners was entirely independent of the Court of Commissioners of Roads and Revenue, and, upon a proper construction of the act which required the tax to be levied, we are satisfied that it was incumbent on the relator to have established his liability, before he could call upon the Commissioners' Court to levy a tax for the purpose of discharging it. It certainly could not have been the intention of the Legislature, to require the court to act without any authentic information before it to regulate its action upon. The proper course for the relator to have pursued would have been, to prove to the court the extent of his liability; and if, upon making that proof, the court refused to assess the necessary tax to discharge it, the performance of the duty could be compelled by a *mandamus*. The answer, in this respect we think, is full and sufficient. It shows, in substance, that no information has been afforded to the court as to the extent of the relator's liability; that no demand for any liability has been presented or proved by him, or on his behalf; and it avers, that if the court has ever refused to make an allowance or appropriation to meet the liability, it has been for these reasons. This ground we consider a full justification for the defendants in refusing to act, and this being the case, it follows, that the court below erred in quashing the return; and as the return must be taken as true, and cannot be traversed, the judgment must not only be reversed, but judgment here rendered dismissing the writ.

MACLIN ET AL. *vs.* WILSON.

1. The statute imposing a forfeiture on a defaulting witness (Clay's Digest, 599, § 21) of one hundred dollars, does not give the party summoning the witness any right to this sum, by way of satisfaction for the injury which he may have sustained; but it is imposed as a punishment upon the delinquent, for his disobedience to the process of the court, and is bestowed gratuitously as matter of good policy, upon the party summoning him.
2. A defaulting witness may excuse himself, by showing that, in failing to attend, he was not guilty either of negligence or wilful disobedience; and this should be the limit of the power of the courts below in allowing excuses.

3. Where the witness appeared in the court below, and rendered his excuse upon *scire facias*, and the bill of exceptions states that he "had been duly subpœnaed," it is not necessary that the subpœna should appear in the record, to enable the Appellate Court to consider the errors assigned.

ERROR to the Circuit Court of Talladega.
Tried before the Hon. EZEKIEL PICKENS.

RICE & MORGAN, for plaintiffs in error.
L. E. PARSONS, *contra.*

PHELAN, J.—Wilson was regularly subpœnaed as a witness for Maclin et al., who were plaintiffs in a suit pending against Reynolds. Judgment *nisi* was rendered against him as a defaulting witness; and being served with *scire facias*, he appeared, and rendered to the court on oath the following excuse, as extracted from the bill of exceptions: "That he had started from his house, on the day set for the trial of said cause, (plaintiffs v. Walker Reynolds,) to attend the court at last term, and testify as a witness for plaintiffs, according to the subpœna served upon him; but, on his way, he met with said Reynolds, who told him that he had just seen Hugh Darby, who told him that he had just come down from court, and that said cause would not be reached until next day; thereupon, said Wilson returned to his home, and on the next day came to court, in company with Reynolds, early in the morning before court was called, and found that the case against Reynolds had been tried the evening before; that he had attended court several days before, as a witness in said cause, and that he had no desire to avoid giving testimony; that there was no understanding to that effect with any person; that he intended no contempt of the court." He further stated, "that he would not have valued the negro in controversy as high as he was valued by the jury."

On this testimony, the court set aside the forfeiture, upon payment of the costs of the *scire facias*; and this action of the court is assigned for error.

The statute (Clay's Digest, 599, § 21) declares, that a witness who fails to attend, after having been duly subpœnaed, "shall pay to the party at whose instance the subpœna issued one hundred dollars," but expressly reserves to such person

his right of action against the witness," for the full damages which may have been sustained for want of such witness' testimony."

Is this statute to be construed in such a manner as to give to the party summoning a witness any right to this sum of one hundred dollars, by way of satisfaction for the injury that may have been sustained? or, is it to be construed as imposing a punishment upon a delinquent, for his disobedience to the process of the court, and bestowed gratuitously upon the party, as matter of good policy? The latter I consider the true construction. The party is allowed, by express words of the statute, to recover, by action against the defaulting witness, full satisfaction for the injury sustained, notwithstanding the imposition of this penalty; and, therefore, to hold that he has any right to it in the way of satisfaction, would be to give him two satisfactions, or at least more than full satisfaction, for one and the same injury. Such a doctrine is opposed to the common rule of justice; and the language of any statute which is intended to establish it, should be clear and explicit.

But this statute calls it a "forfeiture," a "penalty." What is a "forfeiture?" a "penalty?" Something imposed as a punishment for an offence or delinquency. So, this penalty is imposed upon the defaulting witness, for his delinquency in not obeying the command of the law, contained in the process of the court requiring him to appear and give testimony. The law lends her process, her subpœna, to the party, to compel the witness to attend. If he disobeys this command, does he offend against the party, or against the law? Against the law only, which utters the command: "We command you;" the State commands you. The party to the suit has no such power.

This penalty then, I take it, is imposed as a punishment upon the defaulting witness, for his contempt in disobeying the process of the court; and the party upon whom it is bestowed, takes it as a mere gratuity from the State.

The statute declares, that the witness may relieve himself from this forfeiture or penalty, by showing "sufficient cause" of his incapacity to attend, &c. We have already decided, that the witness may show cause by his own oath. Livingston v. Lucas, 6 Ala., 147. How far is any court restricted in

the exercise of its power, in admitting excuses under this act? The words of the act seem very stringent, when they say that the witness must show "an incapacity to attend," &c. This cannot mean a strict physical incapacity, it seems to me; because that would be inconsistent with the idea that it is an act of contempt for its process, which the law means to punish, for that is an act of the mind.

We think it a reasonable construction of this statute to hold, that a witness may excuse himself by showing that, in failing to attend, he was not guilty either of negligence or wilful disobedience; and this should be the limit of the power of the courts below, in allowing excuses. In the case at bar, the witness was manifestly guilty of negligence. He was not justified in neglecting to proceed to court at the time he did, because he was told by the defendant in the case that another person had told him that the case would not be reached that day for trial. To allow such a rule to prevail, would open a door for excuses too wide to consist with the public interest and the dispatch of business in the courts.

Where the witness appeared in the court below, and rendered his excuse upon *scire facias*, and the bill of exceptions states that he "had been duly subpœnaed," it is not necessary that the subpœna should appear in the record, to enable this court to consider the errors assigned.

The judgment is reversed, and the cause remanded.

SASNETT *vs.* WEATHERS ET AL.

1. Trespass will not lie for an act done under a process which is valid on its face, and which regularly issues from a court of competent jurisdiction; but if the court which issued the process had no jurisdiction, it is void, and furnishes no protection either to the officer executing or the court issuing it.
2. A justice of the peace has no jurisdiction to render judgment for costs against the defendant in the preliminary proceedings had before him upon a charge of felony.

ERROR to the Circuit Court of Randolph.
Tried before the Hon. EZEKIEL PICKENS.

TRESPASS by the plaintiff in error against Weathers, Burson and Pricket. The bill of exceptions shows that a charge of felony was preferred against Sasnett and one Kirkland; whereon the preliminary proceedings were had against them before three justices of the peace, and they were bound over to appear at the next term of the Circuit Court; but the grand jury refused to find a true bill against them. The justices also rendered judgment against them "for all costs;" and Weathers, who was one of the three justices, issued execution on this judgment, against the defendants, for "fifty-four dollars, the amount of costs adjudged against them," &c. This execution was levied by Burson, as constable, on the property of the plaintiff in error, who brought trespass for the injury.

The court charged the jury, that the plaintiff could not recover in this form of action, the process not being void; to which charge plaintiff excepted, and he now assigns it for error.

J. W. GWINN, for plaintiff in error.

No counsel for defendants.

CHILTON, C. J.—This was an action of trespass, brought against the justice of the peace who issued an execution and the constable who levied it, by the party whose property was seized under it.

The rule is, that trespass will not lie for an act done under a process which is valid on its face, and which regularly issues from a court of competent jurisdiction; but if the court which issued the process had no jurisdiction, then it is void, and furnishes no protection either to the officer executing or the court issuing it. Watson on Sheriffs, 55; Sewell on Sheriffs, 100–1; 11 Mass. R. 500; ib. 507; 8 ib. 79; 2 Strobh. Rep. 3; 9 Ala. 931.

In the case before us, the justice had no jurisdiction to render judgment for cost, and consequently no authority by law to issue an execution for it; and the process being void, both he and the constable are liable for any injury which is the immediate result of it.

The judgment must be reversed, and the cause must be remanded.

OLIVER *vs.* McCLELLAN.

1. A bailee who is guilty of a conversion by selling or exchanging the property committed to him, is a competent witness for his bailor, in detinue for its recovery, his interest being exactly balanced.
2. An infant may be sued for his *torts*, irrespective of the form of action which the law prescribes for the redress of the wrong done.
3. The fact that a minor is "in the habit of trading on his own account, and working about in the neighborhood, controlling the proceeds of his own labor," does not operate as a forfeiture of that protection which the law throws around him, when it forbids his being sued except in particular cases.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

The case made by the record is this: McClellan lent a horse to one Hall, who exchanged it with Oliver, without the consent of McClellan, but on a stipulation that the exchange was not to be final until it was ratified by McClellan. In a few days after the exchange took place, McClellan refused to ratify it, and insisted on having his own horse restored to him. Hall went to Oliver, told him of McClellan's dissatisfaction, and demanded the horse of him, offering him first ten and then fifteen dollars to induce him to take the horse he had exchanged for that of McClellan, and give up McClellan's horse; Oliver refused all offers, and kept McClellan's horse.

McClellan sued Oliver in detinue to recover his property, and the latter interposed the plea of infancy, which he fully sustained by proof. On the trial, Oliver objected to the introduction of Hall as a witness for the plaintiff, on the ground of interest in the event of the suit; but the objection was overruled, and he excepted.

The judge, (as appears by the bill of exceptions,) charged the jury, "That if they believed the evidence, and that the trade was made under the circumstances shown by it, and that at the time the defendant was under the age of twenty-one years, but was in the habit of trading on his own account and working about in the neighborhood, controlling the proceeds of his labor, they must find for the plaintiff." To this

charge the defendant excepted, and asked the court to charge the jury: "That if they believed from the evidence, that the defendant made the trade with Hall, and agreed at that time that he would see plaintiff, and if he was not satisfied with it, then he would trade back with him, and that the defendant was under twenty-one years of age at that time, and was not of age when this suit was commenced, then they must find for the defendant." This charge the court refused, and the defendant excepted.

The overruling of the objection to the competency of the witness Hall, the charge given, and the refusal to charge as requested, are here assigned for error.

L. E. PARSONS and JOHN WHITE, for plaintiffs in error:

1. Hall was not a competent witness for the plaintiff, because he was directly interested in the event of the suit. Smith v. Prayer, 7 Term R., 60; Bent v. Baker, 3 ib., 27; Lewis v. Post, 1 Ala., 65.

2. The plaintiff in error could not wrongfully withhold property; for, in law, he is incapable of holding property at all. The guardian is responsible for the property which his ward holds.

RICE & MORGAN and JONES & BOWIE, *contra:*

1. Infants are not liable in actions arising *ex contractu*, but they are liable in actions arising *ex delicto*, for positive wrongs and also for constructive torts; and the court will look through the form of the action into the tortious nature of the transaction. Homer v. Thwing, 3 Pick. Rep., 492; 1 Chitty's Pl., 76.

2. It is a constructive tort, if not a positive wrong, for an infant to procure or take the horse of one man from another, without the authority or consent of the owner, either express or implied, and wrongfully to detain the horse from the owner. The wrongful detention is the gist of the action of detinue. And any detinue of the property of another, without his authority or consent, and without any lawful authority, is wrongful. Myers v. Gilbert, 18 Ala. Rep., 467.

3. Detinue may be regarded either as an action *ex contractu* or *ex delicto*. Where the defendant acquires possession of the

property without lawful authority or the authority of the owner, by a trade with a third person, who has no authority to trade the property, such taking of possession is tortious, and amounts to a conversion; and in such case if detinue is brought, it is regarded as an action *ex delicto*. Salter v. Pearce, 4 Ala. Rep., 669.

4. One trespasser is a competent witness against his co-trespasser. One tort-feasor is competent against another joint tort-feasor. This is the necessary result from the incontestable right of election *de melioribus damnis*. No act of any of the tort-feasors can deprive him of this right of election. "To determine the plaintiff's right to elect, he must act," after obtaining judgment. It is entirely contingent, dependent on his own volition, whether there shall be a satisfaction, even after judgment; and it is, therefore, clear that the interest of a co-trespasser when offered as a witness for the plaintiff is only contingent, not certain or fixed, and does not render him incompetent. Blann v. Crocheron, 20 Ala., 320; Lewis v. Post, 1 Ala., 71.

In the case last cited, our Supreme Court noticed this difference between the cases of partners and co-trespassers, and intimate that this difference either creates a distinction, or that the admission of co-trespassers as witnesses for the plaintiff forms an exception to the general rules of evidence. 1 Ala. Rep., 71.

But in the present case, even if the witness was interested for the plaintiff, he was equally interested for the defendant. His interest is balanced. If plaintiff recovers, the witness is liable to the defendant for the value of the property and interest, upon his implied warranty of title. If defendant recovers, the witness is freed from any liability to defendant on his warranty of title.

LIGON, J.—The first question naturally arising on the record, relates to the competency of Hall as a witness for the plaintiff in the court below.

It is contended, that he is interested in procuring a verdict against the plaintiff; because, if the plaintiff recover against Oliver, and that recovery is satisfied, he will exempt himself from a recovery at the suit of the plaintiff for his own con-

version of the horse, in trading him to Oliver; for the plaintiff can have but one satisfaction for the property converted. Were this the whole extent of his liability, the objection would be good. But the witness is not only liable to McClellan in the manner above stated, but if McClellan recover of Oliver, the latter is entitled to his action against the witness for a breach of the implied warranty of the title of the horse, at the time the sale was made to him. Thus, it will be seen, that Hall, the witness, is liable in every event, and that his interest is balanced. A witness so situated, has been constantly held to be competent for either party. 2 Mass. 108; 1 Watts, 135; 1 Bibb, 298; Greenleaf's Ev.

The remaining assignments of error may be well considered together, for the objection to the action of the court below is the same in each, and arises out of the supposition, that an infant or minor cannot be sued in detinue, notwithstanding the conversion of which he is guilty is tortious in its character.

"The gist of the action of detinue is the wrongful or tortious detention of the property, not the original caption, and it is regarded as wholly unimportant whether the defendant's possession was acquired by bailment or trespass." Salter v. Pearce, 4 A. R. 669. The action of detinue, especially when founded on a conversion and detention, such as are exhibited in this case, is in fact an action *ex delicto;* it seeks redress against the defendant for a tort; and, I think it clear, both on principle and authority, that an infant may be sued for his torts, and this, irrespective of the form of action which the law prescribes for the redress of the wrong done. 1 Chitty's Plead. 76; 3 Pick. Rep. 492; 6 Cranch, 226; 9 N. H. 441; 3 McCord, 257.

It may not be improper here to remark, that, in coming to this conclusion, I attach no importance to that portion of the direct charge of the court below which seems to imply, that if the defendant "was in the habit of trading on his own account, and working about in the neighborhood, controlling the proceeds of his own labor," his liability to be sued would be greater, than if he labored alone for his parents or guardian. I am not prepared to say, that the rights or liabilities of an infant, situated as this part of the charge presupposes the de-

fendant in this case to be, would be, in any respect, different from those of other minors, except in this, that he might be considered as the agent of the parent or guardian in making bargains for his own labor, and his acquittances for his wages would be good against such parent or guardian. But even this would not result, unless he thus acted with the consent, or by the connivance of the parent or guardian.

The exercise of these privileges, however, does not operate a forfeiture of that protection which the law throws around the minor, when it forbids his being sued except in particular cases.

Let the judgment be affirmed.

FOWLER *vs.* BANKS.

1. An endorsement by the sheriff on a writ in detinue, that, by virtue of the writ, he had taken the property therein described, and five days having elapsed, and the defendant failing and refusing to put in bond, and the plaintiff having put in bond within five days, that the property had been delivered to the plaintiff, is not sufficient to show that he had executed the writ on the defendant, and will not support a judgment by default.

ERROR to the Circuit Court of Tallapoosa.

Tried before the Hon. EZEKIEL PICKENS.

DETINUE by Banks against Fowler; judgment by default. Error assigned: "That the judgment was by default, when the record does not show that the writ had been executed on the defendant."

LEFTWICH, for plaintiff in error.

FAIR & WHATLEY, *contra.*

PHELAN, J.—This was an action of detinue, and there was a judgment by default. The only endorsement on the writ by the sheriff, is in these words: "Rec'd in office, Feb'ry 1, 1851. Hugh Lockett, Sheriff." "By virtue of the within writ, I have taken the property described in said writ; and

five days having elapsed, the defendant failing and refusing to put in bond as the law directs, and the plaintiff having put in bond within five days, the property is delivered to the plaintiff accordingly, this, Feb'ry 6, 1851. Hugh Lockett, sheriff."

This is no sufficient return of the sheriff, that he had executed this writ upon the defendant. If he were sued for a false return, for returning the same executed, such an endorsement as this could not support the averment that he had so returned it. The judgment being by default, and the writ not appearing to have been executed, the judgment below must be reversed, and the cause remanded.

We remand the cause, as possibly the sheriff may wish to amend his return, so as to show that the writ was in fact executed.

HOLLAND *vs.* ADAMS.

1. A note given in consideration of services rendered by the payee as a physician, when he has not obtained a license, is made void by statute, (Clay's Digest, 487.) yet if he sells drugs and medicines apart from his professional business as a physician, he may recover for them; and where they constitute a part of the consideration of the note, the true question to be determined by the jury is, whether such drugs and medicines were prescribed, administered or furnished by the payee in the capacity of physician, or sold by him as a druggist or apothecary.

ERROR to the Circuit Court of Macon.

Tried before the Hon. EZEKIEL PICKENS.

FAIR & WHATLEY, for plaintiff in error.

G. W. GUNN, *contra.*

CHILTON, C. J.—The plaintiff in error sued the defendant in assumpsit, to recover upon a promissory note for $53 12½. The defence set up was, that the consideration of the note was for the medical services of the plaintiff in error, rendered as a physician, and that said plaintiff had failed to

produce a license to practice as a physician, and could not under the statute be allowed to recover for such services.

Upon the trial, the plaintiff having read the note, and closed, the defendant offered the account containing the items which constituted the consideration of the note. Among these are sundry charges for drugs and medicines, boxes of pills, bottles of oil, magnesia, &c. The court, upon this evidence, charged the jury, "that the plaintiff could not recover for the items of drugs and medicines constituting a portion of the consideration of the note."

If the note in suit was given in consideration of the services of the plaintiff, rendered as a physician or surgeon, then the statute declares it void, Clay's Dig. 487, unless he has obtained a license; but one who practices as a physician may also be a druggist or an apothecary, and while we should be far from allowing the law to be evaded, by holding that the physician could recover for medicines prescribed or administered by him as such, when he had no license, yet if he sells drugs and medicines apart from his professional business as a physician, the fact that he is an unlicensed physician will not prevent his recovering for them.

The true question, then, in this case for the jury was, were the drugs and medicines embraced in the account prescribed, administered or furnished by the plaintiff acting in the capacity of physician; or did he sell them in the capacity of druggist, or apothecary. If in the latter capacity merely, he should have been allowed to recover for them. This inquiry was virtually withdrawn from the jury, by the charge which was given, and which assumed that the plaintiff furnished these articles as a physician. See Allcott v. Barker, 1 Wend. Rep. 526.

Let the judgment be reversed, and the cause remanded.

NIMMO *vs.* STEWART.*

1. The general rule is, that if a devise be to one and his children, and he has children at the date of the will and at the death of the testator, the parent and children living at the testator's death take jointly under the will, if there is nothing in the will from which it can be inferred that the testator intended the interest of the children to be postponed until after the death of their parent.
2. *It seems*, that the rule is the same, if there are no children at the date of the will, but some are afterwards born and in life at the testator's death.
3. A bequest was in these words, viz: "I commit to my three sons, (naming them,) as trustees for my daughter Rhoda and her children, during her, the said Rhoda's, natural life, the ten following negroes," &c., "and my will and desire is, that the profits arising from the aforesaid property, either by hiring or otherwise, shall be applied to the benefit of the said Rhoda and her children; and after the decease of my said daughter Rhoda, my desire is, that what I have left her upon trust shall be equally divided between the heirs of her body, share and share alike, to them and their heirs forever." *Held:* That the children of Rhoda took an immediate and joint interest with their mother on the testator's death.
4. Courts of equity, acting upon the analogy of the statute of limitations, and in imitation of the courts of law, will refuse relief if the legal title would have been barred at law.
5. Where the legal title would be barred by six years' adverse possession, the same rule must be applied when a complainant comes into equity upon an equitable title, disconnected from a trust as between him and the defendant.
6. When the bill shows upon its face that complainant's remedy is barred by the statute of limitations, the benefit of the statute can be invoked by a general demurrer.

ERROR to the Chancery Court of Madison.

Heard before the Hon. D. G. LIGON.

The original bill in this case was filed by James F. Nimmo in his own right against Thomas Stewart, John Thompson, James Nimmo, the father, and Rhoda Nimmo, the mother of complainant, and also against Elizabeth Davis, his sister. Thomas Stewart and John Thompson were the only resident defendants; the others resided in Texas, as to whom publication was made.

The bill alleges, that Samuel Hamner, of Virginia, the

* The opinion in this case was prepared by the late Chief Justice, but was not delivered as the opinion of the court until after his resignation.

REPORTER.

father of Rhoda Nimmo, on the first day of April, 1817, made and published his last will in writing, and soon afterwards departed this life; that on the 7th day of July, 1817, said will was duly admitted to probate in the County Court of Albemarle, and ordered to be recorded, which was done accordingly; that by a clause in said will the testator made a bequest in the following words: "I commit to the care of William Hamner, Morris Hamner and Samuel Hamner, as trustees for my daughter, Rhoda Nimmo, and her children, during her, the said Rhoda Nimmo's, natural life, the ten following negroes, to-wit: Nanny, Charlotte, Patty, Ben, Clarissa, Betsey, Jenny, Madison, George and Moses; likewise four beds and furniture, to which I now add one hundred and forty dollars, to be paid out of my estate; and my will and desire is, that the profits arising from the aforesaid property, either by hiring or otherwise, shall be applied to the benefit of the said Rhoda Nimmo and her children; and after the decease of my said daughter Rhoda, my desire is, that what I have left her upon trust shall be equally divided between the heirs of her body, share and share alike, to them and their heirs forever. It is also my wish and desire, that if James Nimmo outlives his wife Rhoda, that the trustees should furnish him, the said James Nimmo, with a reasonable support, should he be in need of it, out of my estate lent on trust."

The bill also avers, that at the time of the execution of said will the said Rhoda Nimmo had the following children, the issue of the marriage of said James and Rhoda Nimmo, to-wit: Robert, Samuel, James F., the complainant, William, Henry and Elizabeth; that shortly after the death of the testator the said Rhoda had another child, called Mary Jane, and afterwards another, which, however, died within a few months after its birth; that Robert died in 1819, without wife or child, and that Samuel, William and Henry died in 1835 in Texas, and that Mary Jane died in 1837 in the State of Texas, and was the wife of Leroy Davis; that complainant and Elizabeth are the only children now surviving of the said Rhoda, and that said Elizabeth is the widow of Hiram Davis; that the trustees appointed by the will of the testator all died in Virginia previous to the year 1821.

The bill also alleges, that Charlotte, one of the slaves bequeathed by the testator, in the foregoing clause, together with her five children, all of whom were born after the death of the testator, was now in the possession of Thomas Stewart and John Thompson, his son-in-law; that Thomas Stewart became possessed of Charlotte and such of her children as were then born, in the year 1835, under some transfer from said William Nimmo, and from that time he has had the use and possession of Charlotte and her children until 1846, when he put Charlotte and three of her children in the possession of Thompson, his son-in-law, and retained the possession of Calvin and Lucinda himself; that before said Stewart became possessed of said slaves he knew or had heard of the true nature of the title, and that Thompson also knew and heard of the nature of the title before he received the possession of Charlotte and her children.

The bill also alleges, that the father of the complainant and some of his brothers conveyed away some of the negroes in the State of Tennessee, and that the complainant and his sisters had recovered of the purchasers their proportionate share of said negroes thus conveyed; that Ben, one of the slaves named in the will, is now in the possession of complainant, and that, except Ben and his interest in the two slaves sold in Tennessee, he has received nothing from the slaves bequeathed; that there has been considerable increase in the number of said slaves, but some have been sold and carried off, and some are in the possession of the father and mother of complainant in the State of Texas, and others in the possession of his surviving sister; but that none of the negroes are in the State of Alabama except Ben and Charlotte; Ben, who is in the possession of the complainant, and Charlotte and her children, who are in possession of Thomas Stewart and John Thompson as stated.

The prayer of the bill is, that an account be taken of the said negroes and of their use and hire, and that the complainant recover his just proportion or interest in the same.

The bill was amended, and in the amended bill it is alleged, that Samuel Nimmo sold his interest in the slaves bequeathed by said testator to William Nimmo some time before the year 1830, and that William sold his interest afterwards,

which then consisted of two shares, to the complainant. The transfer to the complainant was made in August, 1830; that neither the said Samuel nor William ever received any portion of said slaves. The bill also alleges, that the complainant is the administrator of Robert, Henry, Mary Jane and Rhoda Ann, the latter being the infant that died a few months after she was born, and whose name was not given in the original bill; that Hiram Davis, who had married one of the daughters, had died about two years previous to the filing of the bill, and that the complainant was his administrator; and in the amended bill the complainant claims three shares in his own right, and also the shares of all his brothers, sisters, and of Hiram Davis, upon whose estate he had procured letters of administration to be granted to him.

The defendant, Thomas Stewart, insists on several defences, amongst which are, that the slaves bequeathed by the will had been divided between Mrs. Nimmo and her children, then in life, and the respective share of each allotted to him, and that the complainant had received his share; that he purchased Charlotte, who at the time had but one child; that he bought said negroes from James Nimmo and Rhoda, his wife, and that several of the children joined in the conveyance; that he paid a full price, and has had the quiet possession of them ever since. He concludes his answer with a general demurrer to the bill. Thompson answers, that he has possession of Charlotte and three of her children by way of loan from Stewart, but asserts no title in himself except as the bailee of Stewart.

Thomas Stewart died, and the bill was revived against his executor, William Stewart, who in his answer to the bill of revivor answered the original bill, and amongst other grounds of defence he insists upon the lapse of time and the statute of limitations. James and Rhoda Nimmo, the father and mother of complainant, also died, and the suit was revived against their executors.

There was evidence taken on both sides, but the view taken of the case by the court renders it unnecessary to notice it. The Chancellor dismissed the bill, on the ground that the will gave to Rhoda Nimmo a life estate in the slaves, exclusive of her children; and the remainder, after her death, to

her children, and as the bill was not filed to protect the ultimate interest of the complainant, it could not be sustained. From this decree a writ of error is brought to this court, and the decree of the Chancellor is assigned for error.

BRICKELL & CABANISS and J. W. SHEPHERD, for plaintiff in error:

I. The will does not create an estate-tail in Rhoda Nimmo,

1. Because, (in the language of the decree,) in the same clause of the will in which the words "heirs of her body" are employed, the term "children" twice occurs, in evident reference to the same class, and must be taken to limit and define the more general term, "heirs of her body. These latter words, taken in this sense, must be considered words of purchase, and not of limitation. The intention of the testator is obvious, and it must govern. Woodley v. Findlay et al., 9 Ala., 716; Fellows, Wadsworth & Co. v. Tann, ib. 1003, 2. Because Mrs. Nimmo's interest is an *equitable* life estate, and the remainder is a *legal* estate; and the two estates cannot be consolidated into an estate-tail in her. The remainder and the life estate cannot unite, unless they are both of the same quality; both must be legal, or both equitable. A bequest to trustees, for the use of A during her life, and at her death to be divided among the heirs of her body, gives A only an equitable life estate; because, during her life, the legal estate is in the trustees, while on her death her children take the legal estate in themselves. Trustees are usually interposed in such case, when the first taker is a feme covert, to prevent the marital rights of the husband from attaching. On the death of the wife, there is no longer any necessity for the trustees, and the children take the legal estate in themselves. Fearne on Remanders, 52 to 60; 2 Jarman on Wills, 244.

II. Nor do the children take contingent remainders. Their interest does not depend upon their surviving their mother. Those children who were living at the testator's death took an immediate vested interest in their shares, subject to diminution *pro tanto* by the birth of other children subsequently. Those children who were born after the testator's death became entitled to an equal share with the others. The

shares of those who died during their mother's life descended to their administrators. 2 Jarman on Wills, 74, 75; Right d. Shortridge v. Creber, 12 En. C. L. R., 392; Fellows, Wadsworth & Co. v. Tann, 9 Ala., 1003.

III. The children, during the life of their mother, take a joint interest with her in the profits. The trust is "for Rhoda Nimmo and her children;" the profits are to be applied "to the benefit of the said Rhoda and her children." If the will creates "a trust in favor of Rhoda and her children," as the Chancellor admits, a court of equity will certainly protect the *cestuis que trust*, and will not permit one of them to defeat the rights of the others, by a sale of the entire estate. 2 Jarman on Wills, 74, 75.

IV. As to the plea of the statute of limitations: 1. It is no bar, because the death of the trustees, in whom the legal estate was vested, is alleged and proved to have occurred long before the sale to Stewart. There was no person *in esse*, at the time of the sale, who could sue for the negroes, and, of course, no one against whom the statute could begin to run. The statute bars only the legal estate and the legal owner. Peck's R., 321. In this case, there was no legal remedy whatever. It is true, that courts of equity sometimes act in analogy to the statute, in cases to which it does not strictly apply; but the statute certainly cannot bar *cestuis que trust* of their remedy in equity, when it has never begun to run against the trustee at law.

2. But even if the statute would be a complete bar if prop-ly pleaded, yet William Stewart, *as executor*, has no right to plead it in this case. His testator, the original defendant, might have interposed the plea; by not doing so, he waived the benefit of it. The executor, in his answer to a bill of revivor, cannot set up a new defence, and especially one that his testator has waived. "Upon a bill of revivor, the sole questions before the court are, the competency of the parties, and the correctness of the frame of the bill to revive." Bettes v. Dana, 2 Sumner, 383; 1 Smith's Ch. Pr., 519. "Where the deceased has answered, his representative in legal contemplation must notice the answer and be bound by it. He must take up the defence at the point where he finds it, on the death of the person through whom he claims; and if the cause

is at issue, or ready for hearing, the representative has nothing more to do, than to arrange the trial or hearing. As respects the representative, there seem to be but two points of defence; first, not possessing the character ascribed to him; and secondly, possessing no interest in the subject matter of the suit." Lewis & Lenoir v. Outlaw, 1 Tenn. R., 143. When an answer is required to a bill of revivor, it must be confined to such matters as are called for by the bill, or would be material to the defence with reference to the order made upon it. Upon this ground it has been held, that where a defendant to a bill of revivor inserted in his answer a variety of matters, which, if stated in answer to the original bill, would have been a good defence to that bill, but was not relevant to the question of revivor, the answer was to that extent impertinent. 3 Dan. Ch. Pr., 1711. Impertinent, irrelevant matters cannot affect the decree to be rendered, even if not objected to.

JAMES ROBINSON, *contra:*

The bill cannot be sustained as a bill *quia timet.* It proceeds upon the single idea, that Rhoda's children took a joint interest with their mother during her life, and that they wanted to obtain this immediately. Land and wife v. Cowan et al., 19 Ala. 298.

The trustees elected to give to Rhoda and her husband the possession and use of the trust property. After such election, she could hold against them. Lenoir v. Rainey, 15 Ala. 670. If she could hold against the trustees, she could clearly hold the property against her children, unless the will gave them the right to the immediate possession. So long as the trustees continued to act, the property was to be employed by them, and the children could not deprive them of their possession and control. By their surrender of the possession to Rhoda, the trustees also surrendered to her their power and discretion; and if the children could not take the possession from the trustees, neither can they take it from her. The testator says: "After the death of my daughter, *what I have left her* in trust shall be equally divided," &c.; by this he does not intend to make her a trustee, but evidently refers to the trust which he had already created for her benefit, declaring ex-

pressly that he had already given the property to her. If the children take any specific interest during their mother's life, they must take either as joint tenants or tenants in common; and taking as either, any one of them would have the right to have his share ascertained and set apart for him, and then to take immediate possession of it; so that the first child who came into being could have had a division with his mother. Fellows, Wadsworth & Co. v. Tann, 9 Ala. 1004; McCroan v. Pope, 17 ib. 615. If the children took no specific interest during their mother's life, then it is clear that this suit was commenced too soon.

But if the court should hold, that the children took a specific interest in the property during their mother's life, then they are barred by the statute of limitations of six years, which is pleaded by the executor. They had the same right to sue in 1835, when Stewart acquired the possession, that they had in 1846, at the time of filing their bill. Neither the pleadings nor proof show the occurrence of any fact during the intermediate period, which at all changed or affected their right to sue. It is said, that Stewart as executor cannot plead the statute, because his testator failed to plead it. If this objection can prevail at all, the utmost that can be made of it is, that for this cause the answer was impertinent; and being impertinent, the correct practice was, to have it referred for that cause. This the complainant failed to do, but took his order of revivor, and proceeded to take all his proof, thus admitting that the answer was full and perfect, and waiving all objections to it. 3 Dan. Ch. Pr. 1712. Even if he had filed exceptions, and, without the action of the court thereon, had proceeded to take his proof, this would have been a waiver of the exceptions. Story's Eq. Pl. 665, § 867.

As no words of exclusion are used in the will, the marital rights of the husband attached to whatever rights the wife derived from the will. Did she take an estate for life, or an absolute estate? Courts uniformly hold, that words used in a will must be construed to have their strict technical meaning, unless the will shows that the testator used them in a different sense. The words "heirs of the body," in this will, must have their strict technical meaning, unless the will shows a different intention. There is nothing in the will to connect

these words with the term "children;" nothing to show that the testator did not comprehend the technical meaning of each term; nothing to show that he confounded them. If a testator uses a legal term in one part of a clause, and another term in another part, does it follow that he intended to convey the same meaning by the two terms? If the clause had given an interest to the "children" of Rhoda during her life, and at her death another interest to "the heirs of the body" of another person, the two terms could not possibly be confounded, or construed to mean the same thing; and there is no reason why a different construction should be adopted, when the two different interests are given to the "children" and "heirs of the body" of the same person. If any effect can be given to the word "children," the utmost is, that by it the testator intended to point out the particular persons who were to take a benefit in the profits during his daughter's life; and by the term "heirs of her body," he intended to point out the class of persons who were to take after her death. But no effect can be given to the word "children," because it was used by testator for the sole purpose of showing the motive which induced him to make the bequest. McCroan v. Pope, 17 Ala. 617. If the words "heirs of her body" are construed to have their strict technical meaning, as they certainly must be, then Rhoda took the whole estate; and of course, if she took it, her husband took it. Price v. Price, 5 Ala. 580; Darden's Adm'r v. Burns' Adm'r, 6 ib. 362; 9 Ala. 1003; 15 ib. 375; ib. 669; Fearne on Remainders, 262–3. The intervention of trustees cannot prevent this result; for preservation implies existence, and an estate cannot be preserved if it has no existence. Lenoir v. Rainey, 15 Ala. 669.

DARGAN, C. J.—I fully agree with the Chancellor, that the bill asserts a present interest in the slaves, and is not one to protect a future interest or a remainder, after the death of Mrs. Nimmo, the mother of the complainant. But I think the Chancellor was mistaken in holding, that the will gave to Mrs. Nimmo an exclusive life-estate in the slaves, with a remainder after her death to her children. The general rule is, that, if a devise be to one and his children, and he has children at the date of the will and the death of the testator,

the parent and children living at the testator's death take jointly under the will. This was resolved in Wilde's case, 3 Coke, part 6, 17, and has been steadily adhered to ever since. See the cases collected in 2 Jarman on Wills, 307 to 317. The decisions of this court recognize the same rule. McCroan, Trustee v. Pope et al., 17 Ala. 612; Fellows, Wadsworth & Co. v. Tann, 9 Ala. 1003; also, 1 Sumner, 359; 15 Pick. 104.

It is true, the intention is to govern; but when the devise is general, to one and to his children, and there is nothing in the will from which it can be inferred that the interest of the children is to be postponed until after the death of the parent, they must all take jointly upon the death of the testator; for no other intent can be inferred from a bequest to one and his children, when there are children both at the date of the will and at the death of the testator. Nor should I think the case would be altered, if there were no children at the date of the will, but some had been born afterwards and were in life at the testator's death. 2 Jarman on Wills, 311; 2 Atk. 220. But in this case, there were children both at the date of the will and the death of the testator, and there is nothing contained in the will from which we can infer that the testator intended to postpone the interest of the children until the death of their mother. They, therefore, all took an immediate and a joint interest.

But, notwithstanding this is the character of their interest, I am very clearly of the opinion, that the bill was properly dismissed; for it is shown, not only by the answer and proof, but by the bill itself, that Thomas Stewart had been in the quiet and undisturbed possession of the slaves for about twelve years before this bill was filed; that is, he acquired Charlotte and her then only child in the year 1834, and has retained her ever since, and her other children were born in his possession. This delay, in my opinion, is fatal to the bill; for there has been no legal impediment to its being filed at any time since the defendant Stewart acquired the possession of the slaves.

It may be, that our statute of limitations does not, in express words, embrace bills in equity, or mere equitable demands; yet it is settled beyond controversy, that courts of equity, acting upon the analogy of the statute, and in imita-

tion of courts of law, will refuse relief if the legal title would have been barred at law. Thus, a mortgagor cannot redeem after twenty years adverse possession by the mortgagee, unless something has been done during the time that will waive the bar, or prevent its application. Kane v. Bloodgood, 7 Johns. 90; Hovenden v. Lord Annesley, 2 Sch. & Lef. 607; Johnson v. Johnson, 5 Ala. 90, and cases cited in the opinion.

There are exceptions to this rule, or rather supposed exceptions; I mean in cases of continuing trusts, which are not affected by the statute, or by length of time, so long as they are admitted or acted upon as trusts. But even those must fall within the influence of the statute, if the trust has been denied and repudiated, and the *cestui que trust* permits his trustee to retain possession, after he has acquired a knowledge of the disavowal of the trust, a sufficient time to create a bar to his title had it been a legal one. Kane v. Bloodgood, *supra*.

But, in the case before us, the relation of trustee and *cestui que trust* never existed between the defendant Stewart and the complainant. Stewart acquired the slaves and held them as his own, and the title of the complainant was a mere equitable one, the legal title being in the trustees appointed by the will of the testator; and to hold that the statute did not apply to the equitable title, would be to exempt all equitable titles from its influence. Six years adverse possession would have barred the legal title, and the same rule must be applied when a complainant comes into a court of equity upon an equitable title, disconnected from a trust, as between him and the defendant. I, therefore, think, that, though the complainant took an immediate interest under the will of his grandfather, still he is barred by lapse of time of his remedy, and that the bill was properly dismissed.

It is, however, contended, that the defendant Stewart did not insist upon the statute of limitations in his answer, and that his executor could not set it up in his answer to the bill of revivor; because he was not required to answer the original bill, which had been answered by his testator, and could only put in issue matter going to the propriety of reviving the suit. To this it is answered, that no exception was taken to the answer of the executor, and for this reason, every

thing was in issue presented as a bar to relief by his answer. But I think it unnecessary to examine this question of practice, for the answer of Thomas Stewart contains a general demurrer to the bill, and that upon its face shows that the remedy is barred; and the benefit can in such a case be as well invoked by a demurrer as by a plea. Story's Equity Pl. § 503; Humbert et al. v. The Rector &c. of the Trinity Church, 7 Paige, 195; Dunlap v. Gibbs, 4 Yerger, 94; Tyson v. Poole, 3 Younge & Coll. 266; Hoare v. Peck, 6 Simons, 51. The rule as now settled is, that if the objection appears upon the bill itself, it may be taken advantage of by demurrer; but if the bill does not show that the remedy is barred by lapse of time, then the defendant must insist upon it either in his answer or by plea. The bill before us was filed in the year 1846, and it shows that the defendant came into possession of the slaves by a transfer to him in the year 1835, and has retained possession ever since. It therefore shows, that lapse of time is a bar to the relief sought.

Let the decree be affirmed.

TRAPP & HILL *vs.* MOORE & BORDER.

1. If, through mistake, a written agreement contains substantially more or less than the parties to it intended; or, if, from ignorance or want of skill in the draftsman, the object and intention of the parties, as contemplated by the agreement, is not expressed in the written instrument, by reason of the use of inapt expressions, equity will interpose, upon clear and satisfactory proof of such mistake, and reform the instrument, so as to make it conformable to the true intent of the parties.
2. But where the instrument speaks the true agreement between the parties, equity will not reform it because one or both of them may have mistaken its legal consequences.
3. Where a debtor executed a deed of trust to secure certain of his creditors and sureties and included in it certain notes on which one of the beneficiaries was supposed to be bound as surety, describing them as notes on which said beneficiary was security, under the belief that, if he was not bound, the misdescription would exclude the holder of them from any benefit under the deed, the deed was reformed in equity, upon proof of the mistake, and that the grantor intended to secure the said beneficiary only, and not the notes.

ERROR to the Chancery Court of Greene.
Heard before the Hon. W. W. MASON.

The bill in this case was filed by the defendants in error, to reform a certain deed executed by William S. Hill, one of the plaintiffs in error, to Border and Moore, to secure certain of the grantor's debts. The facts upon which the reformation of the deed is sought, appear in the opinion.

WM. M. MURPHY and J. D. WEBB, for plaintiffs in error:

The bill does not seek to reform the contract as it is set out in the deed, on account of fraud, accident or mistake in drafting the instrument, which are the cases in which courts of chancery will relieve against written instruments. The bill alleges that it was the intention of the grantor to secure Moore & Border, as his securities; that the desire to do that was the inducement for the grantor to make the deed. This statement is directly in conflict with the recitals contained in the deed, one of which is, after reciting various liabilities of the grantor, and particularly the notes held by Trapp: "Whereas, the said W. S. Hill is desirous to secure the payment of the said notes, bills of exchange and judgments," &c.

The bill seeks to set up a new contract, and not to reform the one written down by the scrivener. The bill says that it was agreed between the parties that, if it was found that Moore was not the security on the notes in the possession of Charles Wheeler, payable to Trapp, then they were not to be secured in the deed; the written contract, the deed, says, that the notes were to be paid; the scrivener says that the proviso was not omitted by accident, mistake or fraud, but because the parties held the legal opinion, that the notes would not be secured to be paid out of the trust funds, if Moore was not the security on them. It is true, that the parties made two mistakes; the one was as to the law, the other was as to Moore's being security for the payment of the notes; neither of which come within the rule that would give a court of chancery the power to correct the errors. As well might it be contended, that a mistake as to the market or intrinsic value of property conveyed in a deed, would be cause for a court

of chancery interfering to set aside the conveyance by which the title was passed. Larkins et al. v. Biddle et al., June term, 1852.

It was error to permit the complainants to introduce parol testimony, to show another and different contract to have been made by the parties at the time this writing was executed, without the allegation of either fraud, accident or mistake in the execution of the instrument. The allegation is of a mistake of the consideration, the value of the consideration that led to the contract. In the language of Judge Gaston, in the case of Parker v. Vick, 2 Dev. & Bat. Eq. 195, "parol evidence will not be admitted to show a parol agreement contradictory and varying from a written agreement made at the same time, when no reason is assigned why the latter was not incorporated into the former;" also, in the language of the Chancellor, in the case of Cheeswood v. Britton, 1 Greene's Ch. 438: "Whatever the contracting parties reduce to writing, must be considered as embodying their understanding at the time; but if by fraud, accident or mistake, the paper should not contain the agreement, it may be supplied." To the same point is Ward v. Ledbetter, 1 Dev. & Batt. Eq. 496: "Although parol evidence may be admissible to reform a written contract, yet it cannot be received to show that the written contract was not the one made."

The deed was made in good faith, each party possessing equal information, or at least equal means of acquiring knowledge, and neither having practiced towards the other any unfairness or deception. Juzan et al. v. Toulmin, 9 Ala. 694, 695, and pages cited in 1 Story's Eq. 125, 145, 146 to 164.

If there was any mistake in this case, it was a mistake in law; and equity will not relieve, unless the mistake was so gross and palpable as to superinduce the belief that some undue advantage was taken of the party, owing either to his imbecility of mind or the exercise of improper influence. Haden v. Ware, 15 Ala. 149, 159 and 160; 1 Story's Eq. §§ 113, 114 and 115.

This error or ignorance of law cannot be corrected, to the prejudice of the plaintiff in error, Trapp. 1 Story's Com. on Equity, page 155, note 3.

The deed was drawn in direct accordance with the inten-

tion and under the instructions of complainants, as is fully seen from the allegations of the bill and the testimony.

E. W. PECK, *contra:*

Where a written agreement contains more or less than the parties intended, or is variant from the intent of the parties, by expressing something substantially different, if the mistake is made out by satisfactory proof, equity will reform the contract, so as to make it conformable to the precise intent of the parties. O'Neal, Michaux & Thomas v. Teague & Teague, 8 Ala. 353; Whitehead, by next friend v. Brown, 18 Ala. 682; Paysant v. Ware & Barringer et al., 1 Ala. N. S. 160; Hair et al. v. LaBrouse, 10 Ala. 548; 1 Story's Eq. 164; Dupree v. McDonald, 4 Dess. Rep. 209.

CHILTON, C. J.—This was a bill filed by the defendants in error, to reform a deed made by Hill, one of the plaintiffs in error, to them, conveying certain property in trust for the payment of various demands against Hill, and on most of which Moore was security. The parties to the deed, after setting forth various demands, and stating how they were secured, proceed as follows: "And whereas, the said Hill is justly indebted in several small notes, amounting to about five hundred and fifty dollars, which notes now are, or were, in the possession of Charles Wheeler, on which notes William H. Moore is security; and whereas, the said Hill is anxious and desirous of securing the payment of the said notes," &c.

At the time of the execution of the deed, the parties differed as to whether Moore was bound as the security for Hill upon these notes, Moore himself insisting that he was; whereupon it was concluded to insert them in the deed, describing them as notes on which Moore was security, in order that he might be indemnified if it should turn out to be a correct description; but under a belief, and with the understanding, that if his name was not upon the notes, the misdescription would exclude the holder from any benefit under the deed. It is clearly proved, that the object was to indemnify Moore, and not to secure the payment of these notes, if he were not bound for their payment. The proof also establishes the

fact, that the parties deemed the words employed in the deed with reference to the claims would effect their object. In this consists the mistake which the bill proposes to rectify and reform, and which, by the decree of the Chancellor, was relieved against.

It is contended, in opposition to the decree, that the parties made no mistake in the execution of the contract, and that the deed is precisely as they intended to make it, but that the mistake, if any, consists in a misapprehension of the legal consequences of the provision which they inserted, and being a mistake in law, cannot be made the ground of relief in equity; that, as the deed speaks truly the agreement between the parties, it cannot be reformed by setting up another agreement resting in parol, and which is opposed to the provisions of the written instrument.

To these propositions several cases are cited by the counsel for the plaintiffs in error, and they insist that this case falls directly under the principle asserted by this court in the case of Larkins et al. v. Biddle et al., 21 Ala. 252, 256.

Without impugning in the least the correctness of the authorities cited, when applied to the facts of the respective cases upon which the decisions were based, we believe the case before us is not brought within the influence of either of them.

It would subserve no valuable purpose, to swell this opinion by going into an examination of the numerous adjudications upon the subject; for they generally concur in this, that if, through mistake, a written agreement contains substantially more or less than the parties to it intended, or, from ignorance or want of skill in the draftsman, the object and intention of the parties as contemplated by the agreement is not expressed in the written instrument, by reason of the use of inapt expressions, upon clear and satisfactory proof of such mistake, equity will interpose and reform the agreement, so as to make it conformable to the true intent of the contracting parties. O'Neal et al. v. Teague, 8 Ala. 353; Clopton v. Martin, 11 ib. 187; Stone v. Hale, 17 ib. 557; Whitehead v. Brown, 18 ib. 682; Larkins et al. v. Biddle, *supra;* see, also, 2 Root's Rep. pp. 1, 78, 415; 6 Har. & Johns. 24, 500; 3 Conn. 146.

It is certainly true, as we said in Larkins et al. v. Biddle,

supra, where the instrument speaks the true agreement between the parties, equity will not reform it because one or both of them may have mistaken its legal consequences. For example, if, upon a sale of land, the vendor agrees to insert in the deed a covenant of seizin, and the vendee accepts a conveyance with such covenant only, although each of them may have supposed that such covenant was equivalent to a warranty of title, yet this supposition not entering into and forming a part of the contract, equity would not reform the deed; because it truly speaks the agreement, and to reform it so as to insert a covenant of warranty as to the title, would be to make a new and different contract between the parties. On the other hand, suppose the vendor agrees to insert a covenant of warranty as to the title in the deed, and he covenants that he is seized in fee of the premises, the parties supposing that this amounts in law to a warranty of title, it is clear that equity would afford relief; for, in such case, the parties, through mistake, agree upon the use of terms which fail to express their intent, but express an entirely different thing from that contemplated by their contract. So that where the legal effect of the terms agreed upon by the parties to be employed in a written instrument, through a misapprehension or ignorance of their import, results in a contract different from that really entered into by them, the court of equity, in the exercise of its moral jurisdiction, will reform it. The court looks to the intent of the parties, and sees nothing so sacred in the inapt expressions which their unskillfulness has introduced into the agreement, as to compel a disregard of the real contract when clearly made out.

In the case before us, Moore was mistaken in the fact as to his being a surety on the note, and this mistake of fact is shown to be the reason why this claim was inserted in the deed; and in the next place, the parties were mistaken in the fact that the language employed would exclude the notes from the deed, if he were not so bound; or, perhaps it would be more correct to say, they mistook the legal effect of the language employed by them; yet, as this effect violates the contract, it falls within the principle above laid down.

The condition of the parties has not been so changed by the mistake, or by any act performed in consequence of it, as

to deprive the court of the power to rectify it. The holder of the notes, when excluded from the benefit of the provision in the deed, will be in no worse condition than if his claims had not been mentioned. There was, therefore, no valid objection to the interposition of the Court of Equity to correct the mistake, and to give effect to the contract entered into between these parties, and which the agreement failed to express.

Let the decree be affirmed.

DICKSON *vs.* BACHELDER.

1. In debt on an attachment bond, where the bond set out in the declaration recites that "*Robert Cornell and Charles Cornell had*, on the day of the date of said writing obligatory, prayed an attachment, at the suit of said Robert and Charles Cornell, merchants and partners, using the name of Cornell & Brother," while the bond set out on oyer recites that "*John J. Steiner hath*, on the day of the date hereof, prayed an attachment, at the suit of Robert Cornell and Charles Cornell, merchants and partners, using the name of Cornell & Brother," the variance is not material, as these recitals do not form an essential portion of the condition of the bond.
2. Nor is it a fatal variance, that the declaration proceeds as on a bond given for an *ancillary* attachment, while the bond set out on oyer is, in form and substance, a bond for an *original* attachment.
3. When suit is instituted on an attachment bond, to recover the damages *actually* sustained, it is only necessary to aver in the declaration that the writ was *wrongfully* sued out.

ERROR to the Circuit Court of Chambers.

Tried before the Hon. GEORGE GOLDTHWAITE.

This is an action of debt on an attachment bond made by the defendant and one J. J. Steiner to the plaintiff, for the payment of $1100 25; with the following condition: "The condition of the above obligation is such, that whereas the above bound John J. Steiner hath the day of the date hereof prayed an attachment at the suit of Robert Cornell and Charles Cornell, merchants and partners, using the name of Cornell & Brother, against the estate of the said Josiah Dickson, for

the sum of five hundred and fifty $\frac{12}{100}$ dollars, and has obtained the same returnable to the County Court of Chambers county, to be held at LaFayette on the fourth Monday in January, A. D. 1846: Now, if the said plaintiff shall prosecute his attachment to effect, and pay the defendant all such damages as he may sustain by the wrongful or vexatious suing out said attachment, then this bond to be void, otherwise to remain in full force and virtue."

The writ and declaration are against Bachelder alone, and the latter thus sets out the condition of the bond, and its breach: "Which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect following, to-wit: that Robert Cornell and Charles Cornell had, on the day of the date of the said writing obligatory, prayed an attachment at the suit of the said Robert Cornell and Charles Cornell, merchants and partners using the name of Cornell & Brother, against the estate of the said plaintiff, before Edward Croft, then clerk of the County Court in and for the county and State aforesaid, which said attachment was ancillary to a suit then lately instituted by the said Robert Cornell and Charles Cornell against said plaintiff, returnable to the County Court to be holden for said county of Chambers on the fourth Monday in July in the year 1845, and which said attachment, ancillary to said suit, was made returnable to a County Court to be holden for said county of Chambers on the fourth Monday in January, in the year of our Lord 1846, for the sum of five hundred and fifty dollars and twelve cents; it was conditioned, that said plaintiff should prosecute his said attachment to effect, and pay the defendant (meaning and intending the said plaintiff) all such damages as he may have sustained by the wrongful or vexatious suing out said attachment, then the bond to be void, otherwise to remain in full force and effect; as by said writing obligatory, and the condition thereof, will more fully and at large appear. And the said plaintiff in fact says, that said attachment, so sued out as aforesaid, was wrongfully sued out; that by such wrongful suing out of said attachment the said plaintiff has sustained damage to a large amount, to-wit: the sum of two hundred dollars, by his negro slaves, to-wit: Henry and Tom, being levied by the sheriff of said county under

and by virtue of said writ of attachment, and being so detained by said sheriff for a long space of time, to-wit: ten days; also, in his having been compelled to pay costs, and employ counsel to defend himself and property from said attachment, and to regain the possession of his said negroes; and also in his credit, which has thereby been greatly injured, by which said plaintiff sustained damage to a large amount, to-wit: to the amount of three hundred and fifty dollars." The declaration then proceeds by averring that neither Cornells, Steiner, nor the defendant had paid these damages. In further assigning breaches it is averred, that by, under and by means of this attachment, the sheriff summoned one Camp, a debtor of the plaintiff, as garnishee, and thus prevented him from paying the sum due to the plaintiff, in consequence of which the plaintiff was compelled to sell his slaves at a ruinous sacrifice, and that he suffered damage from this cause to the amount of $; and concludes: "By reason of which said breaches the said writing obligatory became forfeited, and according to said statute an action hath accrued to said plaintiff, to demand and have, of and from the same defendant, the said sum of $1100 25 above demanded. Yet the said defendant, (although often requested so to do,) hath not as yet paid the said sum of money above demanded, or any part thereof, to the said plaintiff, or otherwise, according to the said writing obligatory and condition, but to pay," &c.

To this declaration, on oyer of the bond and condition, the defendant demurred. This demurrer was sustained by the court, and the judgment sustaining the demurrer, is here assigned for error.

BAUGH, for the plaintiff in error.

S. F. RICE, *contra:*

1. The bond executed on the suing out of an attachment is intended as a security against the costs or damages the defendant in attachment may sustain from the wrongful or vexatious act of the plaintiff in attachment. It is not intended as a security against the malicious act of the agent who may sue it out, or of any third person who may sue it out without authority. McCullough v. Walton, 11 Ala. Rep., 492.

2. The obligors in such bond are estopped from denying any admission or recital therein contained, as to the person who sued out the attachment. If such bond shows that such attachment was sued out by the plaintiff in attachment, the obligors would be estopped from denying that fact, and from showing that it was sued out by a third person, or by an agent; and if the bond shows that the attachment was sued out by a third person, (neither agent nor attorney,) there is nothing in such bond to estop the surety therein from showing that the plaintiff in attachment did not sue out the attachment, or authorize it to be sued out, or adopt or ratify such suing out, and thus relieve himself from a recovery for vindictive damages, although the proof might show that the plaintiff in attachment was an enemy to the defendant in attachment. Suppose, for instance, that A and B are known to be enemies to each other; that C, knowing of this enmity, without any authority whatever, gives bond with D as surety, and sues out an attachment in favor of A against B; that A never hears of the suing out of the attachment until long after its issuance, and then repudiates it. Now if the recitals in such bond showed that A sued out the attachment, D, (the surety,) when sued, would be estopped from proving that A did not sue it out or authorize it; and being estopped on this point, proof of A's enmity to B, would almost certainly subject D to a verdict for vindictive damages. This may suffice to show that the admission or recital in such bond, as to the person who sued out the attachment, is a material part or feature in such bond, and must be truly and correctly described in a declaration on the bond, or else there is a ground for objection for a variance.

3. In matters of description of the contract sued on, there must be accuracy. And where the declaration describes the contract as an attachment bond, which bond recites that the attachment was sued out by the plaintiffs in attachment, and the bond is set out by defendant on oyer, accompanied by a demurrer, and the bond thus set out on oyer instead of containing any such recital, recites that the attachment was sued out by a third person, (who does not even profess to be agent or attorney of plaintiff in attachment,) there is such a variance shown as will justify the court in sustaining the demurrer. 1 Chitty's Pl., 228, 229, and note 3.

4. There is a clear misdescription of the legal effect of the bond; that is, of the effect which it would have upon the rights of the defendant here sued, in denying him the right of showing the truth, in several contingencies which might be supposed, and which right he would have if the bond had been correctly described; there must be accuracy in averments descriptive of the contract sued on. Felix v. The State, 18 Ala. Rep., 726.

5. There seem to be other variances, for instance, the beginning of the bond, set out on oyer, shows it to be the bond of "John J. Steiner and Josiah N. Bachelder," whilst the bond, described in the declaration, is the bond of John J. Steiner and Josiah W. Bachelder, (the defendant.) The bond set out on oyer is a bond for an original attachment on its face, if construed without reference to anything else. The bond declared on is averred to be a bond for an ancillary attachment. There is a marked difference in our law between original and ancillary attachments. Reynolds & Elston v. Culbreath, 14 Ala. Rep., 581.

6. The declaration does not negative the ground on which the attachment was sued out. It does not even state the ground on which the attachment was sued out. But the mere conclusion of the pleader is averred, to-wit: that "the attachment was wrongfully sued out." The pleader must state facts, not his conclusions. He must, in such a case as this, show the ground on which the attachment was issued, and must negative the existence of that ground. Moore v. Barclay, 18 Ala. Rep., 672.

7. The declaration does not show any cause of action; it does not show that any valid writ of attachment ever issued, or that such writ was returnable to any court, or that the defendant, or either of the obligors ever delivered such writ to any officer. Marshall v. Betner, 17 Ala. Rep., 835; Sheppard v. Furniss, 19 Ala. Rep., 760; Ragsdale v. Bowles, 16 Ala. Rep., 62.

LIGON, J.—It is contended, that the demurrer to the declaration was rightly sustained, for two reasons: First, because the attachment bond set out in the declaration, and that read on oyer, are essentially variant in this: that in the former it

is recited in the condition, that "Robert Cornell and Charles Cornell had, on the day of the date of said writing obligatory, prayed an attachment at the suit of said Robert and Charles Cornell, merchants and partners, using the name of Cornell & Brother," while in the bond read on oyer it is recited, that "John J. Steiner hath, on the day of the date hereof, prayed an attachment at the suit of Robert and Charles Cornell, merchants and partners, using the name of Cornell & Brother." We do not think that this is a material variance, for these recitals do not form an essential portion of the condition of the bond; especially that part of them which recites the name of the person who applied for the issue of the attachment. The essential part of the condition of this bond, and that for a breach of which alone an action will accrue to the plaintiff, is the same both in the declaration and bond, and is in these words: "Now, if the said plaintiff shall prosecute his attachment to effect, and pay the defendant all such damages as he may sustain by the wrongful or vexatious suing out of said attachment, then this bond to be void; otherwise, to remain in full force and virtue." If this portion be correctly set out and averred in the declaration, with the style of the attachment suit in which the bond was given, and the court and term to which it was made returnable, it is wholly immaterial whether any other portion of the recitals of the bond be set out at all; and if an attempt is made to set them out, and a variance occurs, it is no ground for demurrer. All that can be required of the pleader is, to set out the bond sued on according to its legal effect, and that is sufficiently done in this case.

2. Another variance which is supposed to be fatal is, that the declaration proceeds on the bond as a bond given for an ancillary attachment, whereas, the bond set out on oyer is, in form and substance, a bond for an original attachment. This, we apprehend, can avail the defendant nothing; for the same bond, both in form and substance, is required by law to be given, whether the attachment be original or ancillary, and an attachment sued out under the act of 1837, as auxiliary to a pending suit, need not allege the pendency of the suit. Clay's Dig. 61, § 34; Hounshell v. Phares, 1 Ala. 580.

3. Independent of these supposed variances, it is urged

that the breach laid in the declaration is not broad enough, and does not sufficiently negative the performance of the condition of the bond, to authorize the plaintiff to recover. The declaration distinctly avers, "that said attachment, so sued out as aforesaid, was wrongfully sued out; that by such wrongful suing out of said attachment said plaintiff has sustained damage," &c., going on to lay special damages. This is quite sufficient; since, in suits upon an attachment bond, for the purpose of recovering the actual damages sustained by reason of the wrongful suing out of the writ, it is only necessary to aver that such writ was wrongfully sued out. In such a suit vindictive damages cannot be given, and the question of malice in procuring the writ cannot arise. It is not, therefore, necessary in the declaration either to negative the ground on which the writ was sued out, or to aver that it was done vexatiously or maliciously. Wilson v. Outlaw, Minor, 367; 4 Ala. 212; Herndon v. Forney, ib. 243; McCullough v. Walton, 11 Ala. 492; Jones v. Kirksey, 7 Ala. 622.

We think the Circuit Court erred in sustaining the demurrer; its judgment is, therefore, reversed, and the cause remanded.

WHITE *vs.* BANKS.

1. Sureties have the right to claim contribution from each other, in proportion to the amount paid by each on the common debt; and this right is the result, not of any implied contract between the parties, but of an acknowledged principle of natural justice, which requires that those who voluntarily assume a common burden should bear it in equal proportions.
2. If a surety obtains indemnity, for a consideration paid by him, his co-surety cannot claim the benefit of the indemnity without paying his proportion of the consideration; and if an offer of security be made to them by the principal, upon condition that they should execute a release, which offer is accepted by one, and refused by the other, though the latter would have the right to demand that the proceeds of the securities received should be applied to the reduction of the common debt, yet such proceeds could in no other way inure to his benefit; and the payment would discharge the former from contribution, if it amounted to his proportion of the common debt.
3. A deed of assignment fraudulent on its face as to creditors, is capable of con-

firmation by them; and after the deed has been executed, and the assenting creditors have been paid from the effects assigned, the transaction, as to them, will not be disturbed.

4. A firm made an assignment for the payment of their debts, fraudulent on its face as to creditors, providing that the creditors should, within a specified time, execute the deed and release the assignors, or should receive no part of the proceeds of the trust property, and reserving to the grantors that portion of the proceeds which would have been distributed among the refusing creditors if they had executed the deed. Among the debts thus secured was a note held by the Bank, on which there were two sureties, one of whom executed the deed and released the assignors, while the other refused. The former realized, from the proceeds of the assignment, more than his proportion of the common debt, and applied the amount so received to its reduction. The Bank obtained judgment for the balance of the debt against the other surety, who discharged the same, and then moved for a summary judgment against his co-surety. *Held:*

That he had no claim to contribution under these circumstances.

ERROR to the Circuit Court of Tuskaloosa.
Tried before the Hon. GEO. D. SHORTRIDGE.

MOTION by the defendant in error against the plaintiff, for a summary judgment under the statute, upon the following state of facts:

In the year 1838, the firm of Cummings, Pitcher & Co. made an assignment of their property, in trust for the payment of their debts. The creditors were divided into three classes; and the deed required that they should execute the assignment within a specified time, and release the assignors, or should receive no part of the proceeds of the trust property; it also reserved to the assignors that portion of the proceeds which would have been distributed among those creditors who refused to execute the deed if they had accepted it. At the time of this assignment, the Bank of the State of Alabama was the holder of a certain note, executed by said Cummings, Pitcher & Co., on which the plaintiff and defendant in this motion were liable as sureties; and the assignment placed this debt by name in the first class of creditors. White, the plaintiff in error, executed the deed within the time prescribed, and released the assignors; but Banks, the defendant in error, refused to execute it.

Under this assignment, White, with much trouble and some expense, received about three thousand dollars, which he applied to the payment of the said Bank debt, leaving a

balance unpaid of about fifteen hundred dollars. For this balance the Bank obtained judgment against Banks, which he subsequently discharged, and then made this motion in the Circuit Court, for a summary judgment against White, as co-surety, to recover one half of the amount thus paid by him, the principals being insolvent.

The Circuit Court, upon this state of facts, rendered judgment against White, for one-half of the amount paid by Banks; to which White excepted, and now assigns it for error.

E. W. Peck, Ormond & Nicolson and N. Harris, for plaintiff in error:

The plaintiff, by becoming a party to the deed of assignment, and releasing the assignors, Cummings, Pitcher & Co., acquired the right to devote the moneys he might receive, under the assignment, in the first place, to protect himself, as one of the sureties of Cummings, Pitcher & Co. As to the creditor, the Bank, he was bound to pay the entire debt; but, as between the defendant and himself, being joint sureties, he was only liable to pay one-half. The right then, to devote the moneys he might receive to his own protection, he acquired upon a good consideration, to-wit: the release of the assignors.

The defendant refused to make himself a party to the deed. He preferred to hold on to the liability of Cummings, Pitcher & Co., to repay him whatever he might be compelled to pay the Bank, as one of their sureties.

The only equity that the defendant acquired, by the plaintiff's becoming a party to the deed, was to have the moneys the plaintiff might receive, under the deed, devoted, in good faith, to the payment of the debt of the Bank, whether sufficient to pay all, or only a part thereof. 2 Story's Eq. 555, § 499; Theobald on Principal and Surety, to be found in 1 vol. Law Library 158, 159, ch. 11, § 283.

The deed of assignment was a proposition, offered to both plaintiff and defendant alike. The plaintiff accepted of the proposition, by complying with the conditions imposed by the deed. The defendant refused. It was no act of bad faith on the part of the plaintiff, towards the defendant, to do this. Can there be any principle of equity, that in such a case entitles the defendant, who refused to accept of this proposition,

to share equally the benefits obtained by the acceptance of the plaintiff? Equally, because, the defendant, notwithstanding his refusal, was entitled to certain equities growing out of the plaintiff's acceptance. He was entitled, as before stated, to have the moneys received by the plaintiff under the deed, applied to the payment of the Bank debt, even to the entire extinguishment of it, if sufficient for that purpose. The plaintiff, however, acquired more than an equity, by becoming a party to the deed; he acquired a specific right to apply whatever he might receive, under the deed, first to the discharge of his half of that debt, and if more than sufficient for that purpose, then the equity of the defendant, as co-surety, would come in and require him to apply what was over for the benefit of the defendant.

One surety has an undoubted right to stipulate, in good faith, for a separate indemnity for himself, and to apply such indemnity in extinguishment of his portion of the joint liability. Thompson et al. v. Adams et al., 1 Freeman's Ch. Rep. (Miss.) 225; Augustus Moore v. Isaac Moore, 4 Hawks' Law and Eq. Rep. 358. These cases show, that if one surety, by some fraud, that is, by some act of bad faith, endeavors to gain, by such stipulation, an advantage over a co-surety, equity will not suffer him to reap the benefit of an advantage thus obtained, but will compel him to share it with his co-surety. In this case it is not alleged, or pretended, that the plaintiff was guilty of any bad faith towards the defendant, by becoming a party to the deed of assignment, or that the defendant has been injured by it; on the contrary, it is manifest, the defendant has been benefited by it.

It was asked, whether the release, executed by the plaintiff to the assignors, on becoming a party to the deed, would be binding on him, the deed being fraudulent as to creditors; and it seemed to be conceded, that if this was the effect of the release, that then there would be no equality between the plaintiff and defendant, and consequently no equity on the part of the defendant to share with the plaintiff in the advantages derived by him in becoming a party to the said deed; and this is no doubt true. Now, that the said release is a valid and operative instrument against the plaintiff, in favor of the assignors, can be shown by the best authorities.

If the assignment is valid as between the assignors and the plaintiff, he having become a party to it, then it follows, that the release is valid. This was the very question decided in the case of Henriquez v. Hone, 2 Edwards' Ch. R. 120, and the decree on this question was affirmed in the court of errors. See 13 Wend. Rep. 243.

The plaintiff, therefore, being bound by his release, there is no equality between him and the defendant. The defendant has his remedy over against Cummings, Pitcher & Co., for all the money he has paid for them; but the plaintiff has no such remedy; his release binds him.

This inequality between the condition and situation of the plaintiff and defendant destroys the only principle on which contribution is enforced. There is, therefore, no principle of natural equity or justice springing out of the case in favor of the defendant; and it is not upon contract, but only on the principles of natural justice, that contribution is, in any case, decreed.

Again; in this case the defendant introduced the assignment for the purpose of showing that the money paid by the plaintiff was derived from it; having thus introduced the deed, and made it evidence, is he in a situation to insist upon the fraudulent character of the assignment? He is a mere creditor at large; whereas, judgment creditors only can attack a deed of this kind for fraud; it does not lie in the mouth of a creditor at large to do so. 4 Johns. Ch. R. 671; 2 ib. 144; 2 Leigh's R. 84; 3 ib. 299, 312; 2 Lomax's Dig. 339.

Again; if the assignees, under an assignment which on its face is fraudulent as to creditors, pay over the proceeds of the assigned property to creditors of the assignor, in pursuance of the assignment, before any other creditors obtain a general or specific lien on the assigned property, the other creditors cannot compel the assignees to account to them for such proceeds. Wakeman v. Grover, 4 Paige 242–3; 6 ib. 577; 5 Ala. 324. Nor can a creditor who has thus received the proceeds from the assignees, in satisfaction of his debt, be compelled to account to a creditor who has afterwards, by the judgment or decree of a court, procured the deed to be declared void.

Furthermore—the defendant stood by in silence, and saw

the assignees engaged in discharging their duties under the assignment, and the creditors who had assented to it incurring expense and trouble in securing the rights supposed to be acquired under it, until it was fully executed; therefore, it would violate every principle of good faith to permit him, after all this, to disturb the trusts thus executed in his presence. He must be held to have acquiesced, as to all the acts of the assignees, performed in good faith, in the execution of the trusts under the deed, before any attempt was made to set it aside in the proper forum; and such is the rule upon which courts of equity act in such cases. Wakeman v. Grover, 4 Paige 42.

P. & J. L. MARTIN, *contra:*

I. The general rule is, that payments made by the principal, or out of his fund, inure to the benefit of all the securities. Story's Equity, 555, § 499; Theobald on Principal and Surety, (1 Law Lib.,) ch. 11, 158–9; 2 Stewart, 512; 4 New Hamp., 481; 5 ib., 353, and cases there cited; 17 Mass., 464; 16 Ala., 454. There are but few exceptions to this rule; one exception arises, when a surety is fairly counter-secured, as an inducement to him to become bound, for his individual liability, which stipulation is entered into with the knowledge of his co-sureties. 4 Hawks' Law and Equity R., 358. A surety who becomes bound at the instance of his co-surety, is not liable to him for contribution. 1 Law Lib., 159. Every exception looks to the creation of the liability, and must form a part of the *res gestae*, as between the parties to be affected thereby.

When a payment is made by the principal, whether directly or through one of his sureties, the only question is, whether it was made with the funds of the principal. The principal cannot, by any shift or device, prefer one of his sureties to another, or indemnify one to the exclusion of the other, after the suretyship has been entered into on equal terms, and before payment by them. Nor can any contract made by one surety with the principal, by which such surety obtains the effects of the principal and applies them to the discharge of the common debt, operate as a payment by him for his own benefit to the exclusion of the other surety. These propositions are not denied; but it is contended, that the plaintiff in

error is a purchaser of the effects of Cummings, Pitcher & Co.; that the consideration paid by him was, the release of the principal debtors, whom he discharged by accepting the assignment containing that stipulation; and that the proposition being made to both, and accepted by one, but refused by the other, all the proceeds realized by the former should inure to his own benefit. If this be so, why should he be required to apply all the proceeds to the extinguishment of the common debt? he should only discharge his proportion of the debt, and might hold the surplus as his own private property. But the law is settled, and it is admitted by the counsel for plaintiff in error, that he is bound to apply all the proceeds thus received to the reduction of the common debt; this shows that the property in the proceeds is not changed, but only their control. It is said, that the proposition was made to both and refused by one; but does the refusal by one, and the acceptance by the other, change the title to the effects conveyed? If not, then it is a payment by the principal debtor, and must inure to the benefit of all his sureties. The only inquiry is, from whose effects was the payment made; not, by what means was their control and application secured.

II. The deed of trust is fraudulent on its face, and has no binding efficacy. At the time of its execution, neither Banks nor White was a creditor of Cummings, Pitcher & Co. White never was their creditor; and Banks only became such upon the payment of the judgment rendered against him. He was not in a condition to dispute or interfere with the deed, and might never become so. If it is said, that he might have applied to a court of chancery, *quia timet;* the answer is, that such a step is out of the ordinary course of proceeding, and was equally obligatory upon White; and there is but little credit to be given to White, for signing a fraudulent deed as an excuse for a failure from which he claims a benefit against his co-surety. They both stood precisely in the same relation to their principals; and if White, by a fraudulent combination with them into which Banks would not enter, obtained the control of their effects, and applied them to the discharge of the common liability, how can it be contended that he can make that payment his own?

It is said, that Banks was equally benefited with White,

in the proceeds realized from the assignment. But how can this be, if the payment by White of his half of the debt completely discharged him from liability, while the excess only inured to the benefit of Banks; and if this were true, could not White recover this excess from Banks, as a payment made for his benefit?

Whether or not White is barred by his release, can make no difference. We contend that he is not, upon the authority of Hone v. Henriquez, 13 Wendell's R., 243, if he takes the proper steps for its discharge. But if he is bound, it is upon the ground of his assent to the fraud and participation in it, and this cannot benefit him as between others.

GOLDTHWAITE, J.—Sureties have the right to claim contribution from each other, in proportion to the amount paid by each upon the common debt; and this right is the result, not of any implied contract between the parties, but of an acknowledged principle of natural justice, which requires that those who voluntarily assume a common burden should bear it in equal proportions. Burge on Suretyship, 384; Story's Equity, § 493. It is upon this principle, that sureties are entitled to the benefit of all securities which have been taken by any one of them, to indemnify himself against the principal debt. Theobald on Principal and Surety, ch. 11, § 283; Story's Equity, § 499. This right, it is true, may be affected by circumstances which would render the application of this rule inequitable; as, where one of the sureties, before joining in the bond, stipulated for and obtained security from the principal debtor for his sole benefit, Moore v. Moore, 4 Hawks' Law and Equity R. 358; and upon the same principle, we think it clear, that if one surety should obtain indemnity, for a consideration paid by him, the other could not claim the benefit of such indemnity, without paying his proportion of the consideration. So also, if an offer of security is made by the principal, upon the condition that the sureties should execute a release, the refusal by one to accept the terms offered would not prevent the other from acceding to the proposition; and in such case, although the surety refusing would have the right to demand that the proceeds of the securities received should be fairly devoted to the reduction of the common debt,

such proceeds could in no other way inure to his benefit; and the payment, so far as the right of contribution is concerned, would be considered as made by the paying surety out of his own funds, and if it amounted to his proportion of the debt, it would discharge him from contribution. The offer had been made to all; and there would be no equity in allowing the party who had refused to accede to the proposition, and had paid nothing, to share equally in the indemnity purchased under such circumstances by the other surety.

In the case under consideration, the offer of partial indemnity was made by Cummings, Pitcher & Co., through the medium of the assignment, to both Banks and White. The former refused, and the latter accepted the proposition; and, upon the principle which we have stated, it is clear, that Banks would not be permitted to share equally in the indemnity which White had received, unless the fact of the deed of assignment's being fraudulent upon its face, as it is conceded to be, would have the effect of changing the equities which would otherwise exist between the parties.

Our first impression was, that this circumstance would have that effect, and that the refusal of Banks to become a party to a deed of this character, could not deprive him of any right of contribution, as against the other surety; but, upon more mature consideration, we are satisfied that such is not the law. The deed is only fraudulent as to creditors, but is capable of confirmation by them; and it is clearly deducible from the authorities of this State, as well as of other States, that after the deed has been executed, and the creditors who assented to its provisions have been paid from the effects assigned, the transaction, as to them, will not be disturbed. The assignee, who must, as the deed is fraudulent on its face, be regarded as having notice, cannot be held responsible, either in law or equity, after he has executed it—Wakeman v. Grover, 4 Paige 23, 42; Hazard v. Franklin, 2 Ala. 349; and if a creditor cannot, after the execution of such a deed, hold the assignee responsible, *a fortiori* the same rule of protection must apply to the parties whom the deed was intended to secure.

Under the influence of the cases cited, after White had received the proceeds of the assignment, no creditor could have pursued it with success; and the principle being settled, that

the assignment is valid so far as it has been executed, it is too late for Banks to impeach it.

Neither are there any considerations of natural justice, which should allow Banks to participate equally in this indemnity. Although he refused to assent to the provisions of the deed, he has remained passive and inactive, realizing to a certain extent the benefits of the assignment, by the application of its proceeds to the reduction of the debt upon which he was bound as surety; and after it has been executed, and after he has received all the benefits which can result from its execution, he claims the right to impeach it, as against his co-surety. To allow him to do so, would be contrary to those principles upon which the rights of sureties, as between themselves, depend.

Our conclusion is, that the amount received by White upon the assignment of Cummings, Pitcher & Co. must, under the circumstances disclosed by the record, be considered as his separate indemnity; and as this has been applied to the payment of the principal debt, and exceeds one half of the amount due upon the same, it follows that Banks had no right of contribution as to him, and the ruling of the court below was therefore erroneous.

The judgment must be reversed, and the cause remanded.

HOPPER *vs.* EILAND, USE, &c.

1. Plaintiff in assumpsit cannot recover on the special counts in his declaration, when the contract proved is substantially variant from that set out.
2. *It seems*, that when the contract declared on is in form a conditional note, the plaintiff can give it in evidence under the common count on an account stated, upon proof of its execution and the performance of the condition, and can recover under that count, if there is any legal impediment to his recovery on the special counts.
3. Where a written instrument, in form a conditional note, is signed by the maker with the distinct admission on the part of the payee that it does not contain the terms of their contract, and the understanding that they will meet again at a convenient time and execute another instrument truly setting out the contract, the writing has not the force of a contract good and complete in law,

for want of an absolute, unconditional delivery; and if suit is instituted upon it, as a note, it is not evidence as such for any purpose.

4. *It seems*, that parol proof is admissible to show that the writing on which the suit is founded, a conditional note, was signed by the maker with the distinct admission on the part of the payee that it did not contain the terms of their agreement, and the understanding that they should afterwards, at a convenient time, draw another instrument which would truly express the contract.

ERROR to the Circuit Court of Perry.

Tried before the Hon. GEO. D. SHORTRIDGE.

ASSUMPSIT by M. A. Eiland, to the use of Crocker, against M. B. Hopper. The declaration contains a count for three hundred dollars on an account stated, and also three special counts on an instrument in writing, of which the following is a copy:

"January 1, 1849.

"Twelve months after date, I promise to pay M. A. Eiland the sum of three hundred dollars, for the rent of Michael Cammack's saw mill, in the county of Perry and State of Alabama: *Provided*, however, that one good team of four oxen or mules can keep the mill sawing at the rate of one thousand feet in one day; if not, he agrees to give two hundred dollars without any conditions.

(Signed,) "M. B. HOPPER.

"Attest: Edward Keeten."

The plaintiff introduced testimony conducing to prove the allegations of his special counts. Wm. H. Dearing, one of his witnesses, testified, that he was at the time of the trial, in the fall of 1850, and had been since December, 1849, the owner of said saw mill, and had tested the experiment himself after he was summoned as a witness in this case, and that four oxen never hauled less than five stocks per day, each of which would make between 250 and 500 feet of square-edged lumber; that he also knew, having made the experiment since he was summoned as a witness, that four good oxen or mules could keep the mill sawing one thousand feet of lumber per day, and in addition haul two loads of lumber per week to Marion, a distance of ten or twelve miles.

The defendant then proved by Edward Keeten, the subscribing witness to the note, that he was present when the contract between plaintiff and defendant, for the rent of said

saw mill for the year 1849, was made; that Hopper, after reading the note over twice, objected to signing it, on the ground that it did not truly set forth the terms of their contract; that the contract was then stated by them, and was as follows: The defendant was to pay three hundred dollars for the mill, if a good team of four oxen or mules could keep said mill cutting one thousand feet of good, merchantable, square-edged lumber per day, the year round, from timber hauled from the tract of land which was attached to and rented with said mill, and that he should pay two hundred dollars unconditionally; that defendant might use oxen or mules, at his election; that he was called on by the parties, to bear witness that such was the contract between them; that said Eiland was then in a hurry, it being about night, and proposed to Hopper that, if he would sign said instrument, they would meet at some future time, when convenient, and execute another written instrument which should contain the terms of said contract as then agreed upon, as aforesaid; and that thereupon said Hopper signed the note. The witness also testified, that, both before and after said note was executed, Eiland admitted that it did not truly set forth the terms of their contract, and that the contract was as above stated.

The defendant then introduced other witnesses, whose testimony conduced to prove that a good team of four oxen or mules could not haul lumber enough, from said tract of land to said mill, to keep the mill cutting one thousand feet of lumber per day, the year round; and further, that such a team could not perform such service, and in addition thereto haul two loads of lumber per week to Marion. The defendant also proved a set-off, which was admitted, to the amount of $201 73. He also offered evidence tending to show that the lumber sawed by the witness Dearing was knotty and sappy, and was not good merchantable lumber. On the cross-examination of the defendant's witness, plaintiff's counsel asked him the following questions: "Did you not order the said Dearing to saw sap lumber at said mill for yourself? Did you not buy sap lumber from said Dearing last winter, for a flatboat?" The defendant objected to each one of these questions, but his objections were overruled, and he excepted.

The questions were then answered by the witness in the affirmative. To this testimony also, defendant objected; but the court allowed it to go to the jury, and defendant excepted. There was a conflict in the proof, as to whether sap lumber was good merchantable lumber or not.

The plaintiff then introduced evidence to show that the defendant went into possession of the mills, and continued in their possession until September 1, 1849, and then sold his interest in them to the witness Dearing.

The defendant's counsel insisted, before the court, that there was such a variance between the contract declared on and that established by the proof, that plaintiff could not recover under any count in his declaration. The court charged the jury:

"That, although they might believe that the contract for the rent of said mills was not truly set forth in the note sued on, that said note was an incomplete statement, and was signed under the assurance that a new instrument should subsequently be drawn, which would embrace all the terms of the contract, and that the true contract under which the defendant rented and held the mills for the year 1849 was shown by the testimony of the witness Keeten, that said contract was valid and subsisting for the whole year—still, the plaintiff would be entitled to recover on the last count in his declaration;" to which charge the defendant excepted.

The errors assigned are:

1. The overruling of the objections to the questions severally propounded to the witness on cross-examination, and the admission of his answers as evidence;

2. The charge of the court above set out.

I. W. Garrott, for plaintiff in error:

The plaintiff below having declared on a special contract, and the proof having shown a valid and subsisting contract variant from that set out, he could not recover on any one of his special counts, because of the variance; and he could not recover on the common count on an account stated, because there was a valid and subsisting special contract. Snedicor v. Leachman, 10 Ala. 330; Hulle v. Heightman, 2 East, 145; Hitchcock v. Lukens, 8 Porter, 333; Chitty on Contracts, 169.

He could not recover under that count, because under that count only a pecuniary demand, the terms of which are fixed and agreed on by the parties, can be recovered, Chitty on Contracts, 197, 199; and the acknowledgment must be unqualified and unconditional. Evans v. Verity, 1 Ryan & Moody, 239; (21 E. C. L. R. 427;) 2 Green. Ev. § 126; 4 Phil. Ev. 125.

No question can here be raised, as to the admissibility of the evidence of the witness Keeten, as it appears from the record to have been admitted without objection. The charge of the court was predicated on the evidence before it; and if erroneous, it cannot be sustained because the court may have committed another error, in admitting this testimony. Jacobs v. Finkel, 7 Blackf. 432.

The questions which were objected to by plaintiff in error, and which the court allowed to be put to the witness and to be answered by him, were irrelevant, and tended to mislead the jury. The court erred in admitting these questions and the answers thereto. Johnston v. Branch Bank, 7 Ala. 378; Lawson v. Orear, ib. 784; Abney v. Kingsland, 10 ib. 355; McCurry v. Hooper, 12 ib. 823.

A. B. MOORE, *contra:*

The rule, that when a plaintiff declares on a special contract, adding the common counts, and the contract proved is different from that set out, he cannot recover at all, does not apply to this case, 1. Because, the contract here is in writing, and is declared on according to its legal effect, and is proved by plaintiff as alleged. The defendant, therefore, cannot relieve himself frem liability on said contract, unless he can show a failure of consideration, in whole or in part, or fraud, or illegality in the contract. Litchfield v. Falconer, 2 Ala. 280.

2. When a contract has been reduced to writing, parol evidence is only admissible to show a failure of consideration, fraud, or that the consideration was illegal; but not to vary the written contract. 2 Ala. 280. A recovery may be had on the common counts, although there is a special contract, whenever, by its breach, the plaintiff is entitled to recover a sum *in numero*, or which can be rendered certain by mere

calculation. Sprague & wife v. Morgan & wife, 7 Ala. 952. Parol evidence is not admissible to show a contract different from that reduced to writing and declared on, for the purpose of making that a ground of defence; for the reason that parol evidence is inadmissible to vary or contradict a written contract. Long v. Davis, 18 Ala. 801; West & West v. Kelly, 19 ib. 353.

3. The note in this case must be regarded as a complete expression of the agreement between the parties, and is different from the note in the case of Self v. Herrington, 11 Ala. 489. If a note professes to set out the consideration upon which it is based, a different consideration cannot be proved by parol. 11 Ala. 1009: 16 ib. 90.

4. To entitle plaintiff in error to a reversal, he must show injury as well as error. Lawson v. Orear, 7 Ala. 784; Goodwin v. McCoy, 13 ib. 271; Bohannon v. Chapman, 17 ib. 196; 18 ib. 819.

PHELAN, J.—The court charged the jury, that, admitting the contract to be as stated by the witness Keeten, still, the plaintiff was entitled to recover on the last count in the declaration, which was a count on an account stated. This presents the main question in the case, which we will proceed to consider. That the plaintiff could not recover on the special counts on the written instrument, is clear; because, no man is allowed to recover on a declaration whose allegations are not supported by proof, and the proof in the cause shows that the contract between the parties was substantially variant from that set out in the special counts of the declaration, founded on the written instrument.

The next question is, could the plaintiff recover on the common count—the count on an account stated, according to the proof? If the contract between the parties had been that set out in the written instrument, which was in form a conditional note, the plaintiff, by proving that he had performed the condition on his part to be performed, viz: that a team of four oxen or mules could keep the mill sawing at the rate of a thousand feet of lumber per day, would be allowed, on proving its execution, to give the note in evidence under the common count, and could have recovered under

that count, had there been any legal impediment to his recovery on the special counts. At least, I consider the authorities as favoring such a conclusion. Catlin v. Gilders, 3 Ala. 536; Hightower v. Ivy, 2 Porter, 308; Sprague & wife v. Morgan & wife, 7 Ala. 952; Payson v. Whitcomb, 15 Pick. 212; Crandal v. Bradley, 7 Wend. 311. But in this case, if the contract between the parties had been that set out in the written instrument, there would have been no need for resorting to the common count; the special counts would have been satisfactory and sufficient. That, however, was not the contract, as shown by the testimony of Keeten, and the charge of the court is based upon the truth of his testimony. He proved, that the note sued on was signed by Hopper with the distinct admission on the part of Eiland that it did not contain the contract between them; that the contract in fact was, that a team of good oxen or mules would be able to keep the mill cutting one thousand feet of good, merchantable, square-edged lumber, per day, the year round, from timber hauled from the tract of land attached to and rented with said mill, and under an agreement that, at a convenient time, another instrument should be drawn, which would truly set out their contract.

In view of these facts, the writing in the hands of Eiland, upon which he instituted suit, never had the force of a contract good and complete in law. He had the right to retain it, as a written memorandum showing in some degree the nature of the contract between himself and Hopper, and useful for the purpose of adjusting and settling the real terms of the contract at some future time; but for nothing more. When he attempted to enforce it, as a complete and binding contract, contrary to his express agreement at the time he received it, by bringing suit and declaring on it as such, it became powerless in his hands for any such purpose. Such a use of it was an act of bad faith; and an attempt to put it to such a use could not be sanctioned by the court, in any way, without giving countenance to an act of bad faith; in other words, to a fraud. For want of an absolute, unconditional delivery, this paper never had the character and qualities of a note, so as to make it evidence as such for any purpose.

Even conceding, then, that a note, or a conditional note

when the condition has been performed, may be given in evidence under a count on an account stated, and entitle the plaintiff in the action to a recovery, in the absence of stronger countervailing proof, this paper was never entitled to be received in that character. Nothing remains, but the parol agreement as proven by Keeten. It will not be pretended, that plaintiff could recover on an account stated with that proof, even if he could show that he had performed all his undertaking according to such agreement.

It will be seen from these views, that we conceive the court below to have erred in the charge given to the jury.

As the defendant in error will have to shape his declaration entirely anew, so as to make it conform to the contract as it was proven to exist between the parties, before another trial is had, we deem it unnecessary to decide on the errors assigned relating to the objections that were taken to the answers of the witness, about his purchasing sappy lumber from Dearing, and using it in the construction of a flat-boat.

No objection was made in the court below to the parol evidence going to vary the written instrument, and therefore the objection cannot be noticed here. From what has been said, however, it may be readily inferred that, if the objection had been made, we should have been disposed to consider it untenable, under the proof in the case.

For the error in the charge of the court, the judgment below is reversed, and the cause remanded.

MARTIN *vs.* BLACK'S EXECUTORS.

1. A proposition or offer made by letter which is not replied to within a reasonable time, cannot be considered as a contract.
2. A promise to pay the debt of another, if reduced to writing and founded on a sufficient legal consideration, is binding, whether the consideration be a benefit to the promisor or a prejudice to the promisee; but if the promise is not reduced to writing, it is void, unless founded on some new consideration beneficial to the promisor.
3. A verbal promise by defendant, to pay a debt against the estate of her deceased son, if the attorney who held the debt for collection would also act as her

attorney, in having the administrator of the estate removed and herself appointed administratix *de bonis non*, is void within the statute of frauds, it being shown that the attorney charged her for his said services, and that she had paid him.

ERROR to the Circuit Court of Lowndes.

Tried before the Hon. EZEKIEL PICKENS.

This suit was instituted against Margaret Black, the testatrix of the defendants in error, on a note executed by William W. Black, who was her son; which note, it is alleged, after the death of said William W. Black, she promised to pay. The note is for $67 33, and is payable to the plaintiff, James Martin.

The promise upon which the defendant was sought to be charged, is thus stated: That she, the said defendant, "after the death of the said William W. Black, was appointed administratrix of his estate, and as such had possession of said estate to a large amount; and thereupon, in consideration of the premises, and that the said plaintiff, at the special instance and request of the said Margaret, would forbear and give time to her, the said Margaret, as such administratrix of said estate, for the payment of said sum of money, so due the said plaintiff, until she, the said Margaret, could dispose of the cotton crop made on the plantation during the year 1847, and which was cultivated by the said William W. Black in his lifetime, she, the said Margaret, undertook and promised said plaintiff to pay him said sum of money in the said note specified, when she, as such administratrix, disposed of said crop of cotton." The declaration then avers, that the said plaintiff did forbear suit on said note, and that the defendant had disposed of said crop of cotton; whereby she became liable, &c.

The declaration also contains the common counts, for money had and received, goods sold and delivered, services done and performed, &c.

Margaret Black died, pending the suit, and it was revived against her executors. A trial was had, which resulted in favor of the defendants; but the plaintiff took a bill of exceptions to the rulings of the Circuit Court on the trial, and brings the case, by writ of error, to this court.

From the bill of exceptions it appears, that the only prom-

ise in writing consisted of a letter, written by Mr. Chappell, under the authority of Mrs. Black, the defendant, to R. A. Colclough, Esq., the attorney of the plaintiff. This letter was dated at Columbia, S. C., October 28, 1847, and is as follows:

"DEAR SIR: On coming here this morning, I received a letter from Col. Gregg, Mrs. Black's legal adviser, desiring that I would take some agency in the settlement of her matters in Alabama, in reference to her son William's indebtedness. I have for some time abandoned the turmoil of legal proceedings; but, to oblige both my friend Gregg and Mrs. Black, I have consented to interfere in the settlement of the estate.

"I wish, if it be practicable, (and I see no reason to the contrary,) that the claims against Dr. William W. Black may be allowed to remain in abeyance for a short time. No one will suffer by it, and eventually all will be paid; and the delay for a few weeks, or a few months, cannot be a matter of importance to the claimants, especially when the ease and comfort of an aged, and at this time disconsolate mother, is taken into consideration; (for she has just learned, that her other son, Thomas, is very ill, and probably before this dead.)

"Mrs. Black authorizes me to say, that all the just claims against the doctor shall be paid; first, out of the present year's crop, and if any deficiency shall accrue, it shall be supplied out of the first funds she shall be able to command. At all events, the delay will not be long. As regards the claims you represent, she says, they shall be met, and she will, I suppose, so soon as she has recovered a little from her present depression, give Mr. Bradley the acknowledgment which you appended to your memorandum.

"With these assurances, and with the further assurance that, in a few weeks, she will send on some one fully authorized to arrange these matters, I hope you and your clients, and all other claimants, will be content. She wishes the crop gathered, and sold, and applied to William's debts, and for the balance she will provide. The property will not be removed; so all will be perfectly secured. I wish that you and all others representing claims will forbear to institute legal proceedings, which will only swell the amount of costs, and abstract from Mrs. Black's means. I shall be out myself

in a few weeks, when I will see you and all others whom I may meet, and, I hope, satisfy you on these matters; until which time, I hope and trust there will be a general forbearance, and that no steps will be taken to sell the property, or to incur costs unnecessarily. I have seen Mr. Bradley and the register of claims; and so soon as Mrs. B. is over her present depression, I suppose he will send you the acknowledgment. In the meantime, I remain yours, &c."

It was not shown, that Mr. Colclough or any one else ever replied to this letter. But it was proved, that letters of administration on the estate of said William W. Black were granted to one William E. Harris, on the first of October, 1847, and that said Harris was removed, and Mrs. Black was appointed administratrix *de bonis non*. It was also proved, that a conversation took place between Mrs. Black and said Colclough, about the first of December, 1847, relative to said claims and the said administration, in the course of which Mrs. Black proposed to employ Colclough as her attorney, to get the said Harris removed from said administration, and have herself appointed; that Colclough refused to be employed for that purpose, unless Mrs. Black would agree to settle and pay the claims then in his hands for collection, amongst which was the note on which this suit is founded; that Mrs. Black agreed to pay said claims, out of the proceeds of said cotton crop, which, however, she claimed as her own, as she also claimed the land and negroes in the possession of said Black at the time of his death.

The proof also showed, that said Colclough did act as Mrs. Black's attorney, in having Harris removed and herself appointed administratrix *de bonis non*, with the understanding that she should pay all the claims which he held against said Black's estate for collection; that no proceedings were instituted upon these claims against the said estate, and that Mrs. Black sold said crop of cotton about the first of May, 1848. It was also shown, that Colclough had brought suit against Mrs. Black, to recover for his services as an attorney, and had recovered a judgment which Mrs. Black afterwards paid; the amount of this judgment, however, is not shown by the bill of exceptions. It further appeared in evidence, that Colclough had an interview with Mrs. Black, in September, 1847,

in Columbia, South Carolina; and that she then claimed the land and negroes of which said William W. Black had possession at the time of his death, but proposed to Colclough that she would pay said claims, if he would take no proceedings against said estate, out of the proceeds of the cotton crop, which was raised in 1847, and which would probably be sold during the spring of 1848. To this proposition Colclough assented, and took no proceedings to enforce the collection of said claims.

On this evidence, the court instructed the jury, that if they believed it all, they should find a verdict for the defendants; to which charge the plaintiff excepted, and he now assigns it for error.

WATTS, JUDGE & JACKSON, for plaintiff in error:

1. The consideration for a promise may either be a benefit to the promisor or injury to the promisee. Story on Contracts, § 431; Allen v. Travis, 1 Stewart & Porter, 192; 4 Ala., 230.

2. There can, on principle, be no difference between the character of a promise to pay the debt of another and an original promise, so far as the consideration is concerned, provided the promise to pay the debt of another is founded on some new and distinct consideration. To take the case out of the statute of frauds, there must be some new and distinct consideration; in other words, it must be of the nature of an original contract, to take it out of the statute of frauds. How then can it be said in such a case, that the consideration must be some benefit to the promisor? In every original contract the consideration may be a benefit to the promisor or an injury to the promisee.

3. In the case at bar, we say, however, that there was a written contract promising to pay the debt of another, on sufficient consideration. It is not necessary that the consideration should be expressed in the written promise. Thompson v. Hall, 16 Ala., 204.

4. The promise made by Mrs. Black to pay, in consideration that no proceedings should be taken to subject the property in Alabama, which William W. Black died possessed of, and which he claimed as his own, and which she

likewise claimed as her own, is a promise beneficial to her; it is a promise by way of compromise. The failure to proceed against this property was a benefit to her (she claiming it as her own) in preventing costs of a sale under administration, and other expenses necessarily incident to a proceeding to subject it to the payment of his debts. This is something more than mere delay; it is a new contract founded upon a new consideration. Travis v. Allen, 1 S. & P., 192, and authorities therein cited.

5. The promise to Colclough to pay these debts in consideration of getting his services as attorney, is a promise beneficial to her, and upon sufficient consideration, and is not within the statute of frauds. It is a new contract, an original contract upon a new consideration. Courts will not undertake to measure the sufficiency of the consideration; i. e., will not undertake to ascertain whether it is a consideration fully equivalent. 8 Johns., 23; Story on Contracts, § 431.

6. It is now well settled, although at first the cases were contradictory, that, in cases of simple contract, if one person make a promise to another for the benefit of a third, although no consideration move from such third person, it is binding, and either the party to whom it is made, or for whose benefit it is made, may bring the action. Story on Contracts, 450, 451; Chitty on Con., 54; 17 Mass., 400; 3 Shepley, (15 Maine Rep.,) 285; 17 Mass., 575.

7. The forbearance need not be specified distinctly, nor need any specific length of time be named, provided it appear to be reasonable. See this case decided at last term of the court; see also, Chitty on Con., 37, and authorities there cited; Smith v. Algar, 1 B. & Ad., 603; Story on Contracts, § 435, and authorities there cited.

ELMORE & YANCEY and I. B. STONE, *contra:*

I. The parol promise to Colclough, made in South Carolina, is void under the statute of frauds as without consideration. Brown v. Barnes, 6 Ala., 694; 3 Metcalf, 396; Martin v. Black, decided January term, 1852.

II. Mrs. Black was not bound by the letter, because:

1. It is an absolute promise to pay the debt, without any condition or consideration stipulated for, asked or proposed.

The promise to pay and the request not to sue are distinct, neither in any manner dependent on or connected with the other. This promise is then without consideration and invalid, independent of the statute of frauds. Its being in writing makes no difference. Beall & Co. v. Ridgeway, 18 Ala., 117.

2. If construed as a proposition or even a promise to pay in consideration of forbearance, the proposition or promise was not accepted by the plaintiff or his attorney, or any one for him. The letter was not answered. The plaintiff not being bound to forbear, Mrs. Black was not bound by the promise. There was no mutuality of promise.

3. The promise, if in consideration of forbearance, was if the forbearance should be for a "short time," "a few weeks" or even "months," which is too vague. Story on Contracts, § 435, (and cases in note) 357. As to its being a proposition only and not accepted. Allen v. Roberts, 2 Bibb, 98; Steele v. Dart, 6 Ala., 798; Musgrove v. Hudson, 2 Stew., 464; Abeel v. Radcliffe, 13 John., 299; Adams v. McMillan, 7 Porter, 73; 1 Greenleaf on Evidence, § 268, 305; Roberts on Frauds, 105.

III. The plaintiff cannot recover on the last promise to Colclough, because:

1. There was no privity of contract between the plaintiff and Mrs. Black; he was not present, and furnished no part of the consideration, and was not bound to forbear; the promise was not to him, and Colclough had no authority from him to accept the terms and bind him. The authority of Colclough was that of an attorney at law only. Crow v. Rogers, 1 Strange, 592; Price v. Easton, 4 B. & Adol., 433; Osborne v. Rogers, 1 Saunders, 264; Sailly v. Cleveland et al., 10 Wendell, 156; Spencer v. Field, 10 Wendell, 87; 1 Chitty on Pleading, 1 to 7.

2. The promise was to Colclough, who furnished the consideration, and had an interest in the note and in its collection, and a lien on it for his fees. The legal interest in the promise was then in him, and he alone, if any one, could sue for its breach.

In the cases where it is held, either the parties for whose benefit the promise was made, or the person who furnished

the consideration may maintain the action, the decisions rest on the principle that both were parties or privies to the contract, both being present when the contract was made; or there was some circumstance to make them parties or privies, as a subsequent promise to the plaintiff. See authorities *supra*; also, Wilson v. Coupland, 5 B. & Alder., 228; Tipper v. Bickwell, 3 Bing. N. C., 710; Webb v. Roades, 3 Bing. N. C., 734; Disborne v. Denable, 1 Rolle's Ab., (pt. 5,) 31; Starkey v. Mylne, 1 Rolle's Ab., (pt. 13,) 32; Story on Con., § 450, 368–9; 4 Ala., 230. On the same principle, even courts of chancery will not enforce executory trusts in favor of volunteers who are neither parties or privies to the deed or agreement, on their application, even when there has been a valuable consideration for the trust. Davenport v. Bishop, 2 Y. & C., 451; 2 Keene, 81; 11 Simons, 584; 3 Merivale, 707; 3 Simons, 1; 2 Myl. & K., 495; 3 Merivale, 249; Story's Eq., § 793, 302.

3. And this case is not within the influence of the rule in Dutton v. Pool, because Colclough did not render his services as the agent of the plaintiff, but in his own behalf as an attorney, and sues for, recovers, and is paid for them.

4. The promise was, to pay out of the cotton made with property in possession of the intestate in his life time, and claimed by him, and on the testimony his. It was a promise then by her to pay out of the assets of the estate before she had anything to do with it; and the amount of assets is not shown.

5. It is not shown that the original debt was discharged, and Mrs. Black's promise is a collateral undertaking, which must be in writing.

DARGAN, C. J.—The plaintiff in error insists that he was entitled to a recovery on the written promise contained in the letter of Chappell to Colclough, and also on the verbal promise made by Mrs. Black to Colclough at Montgomery in December, 1847.

In reference to the written promise, the case differs widely from what it was when it was before this court at a previous term. Then the bill of exceptions merely showed that Mrs. Black promised in writing to pay the debt, in consideration

of forbearance to sue the estate of William W. Black, deceased; but now the written instrument itself is brought before us, which is the letter of Mr. Chappell, written to Mr. Colclough, under the authority of the defendants' testatrix. But this letter, in connection with the other proof, falls far short of showing a binding contract to pay the debt; for the rule unquestionably is, that a mere offer to do an act, or to enter into a contract, cannot, within itself, create a binding obligation on the party making it. Before it can have the effect to create an obligation, it must be accepted or assented to by the party to whom it was made; and this acceptance or assent must be made known in a reasonable time to the party making such offer. This proposition is so universally true, that it is needless to refer to authorities to sustain it. Many of them, however, will be found collected in Chitty on Contracts, 7th Am. Ed. by Parker, from page 6 to 16. The letter of Mr. Chappell was never answered, nor does it even appear that its terms were agreed to; if, then, it could be construed as containing terms sufficiently definite to create a contract, (which, I think, is very questionable,) still, it can be considered in no other light than a mere offer, to which no reply was given, and therefore not a contract.

The verbal promise made to Mr. Colclough in December, 1847, was founded on this consideration: Mrs. Black applied to Colclough to have Harris, who had been appointed administrator of William W. Black's estate, removed from office, and to have her appointed administratrix *de bonis non*. He refused to be employed, unless she would agree to pay all the claims against the estate which he held for collection, amongst which was the note sued on. To this Mrs. Black agreed, and Colclough acted as her attorney in removing Harris from the office of administrator, and in having her appointed; but he charged her for his services, which has been paid. Upon these facts the question arises, whether Mrs. Black is bound by this verbal promise to pay the debts which Colclough held for collection against the estate? We think the law is settled, and on principles incontrovertibly correct, that if the promise to pay the debt of another be reduced to writing, and be founded on a sufficient consideration, whether that consideration be beneficial to the promisor, or a prejudice to the promisee, the

promise nevertheless is binding. But if the promise be not reduced to writing, then, before it can be enforced as a valid contract, it must be shown that the consideration was beneficial to the promisor. Brown v. Barnes, 6 Ala. 694; Nelson v. Boynton, 3 Met. 396; Martin v. Black's Ex'r, 20 Ala. 309. The reason of this distinction is plain; for, to enforce a promise (not reduced to writing) to pay the debt of another, when the consideration is not beneficial to the promisor, would be wholly to disregard the statute of frauds. No promise is binding in law, unless founded on a consideration; and to hold that a consideration alone would render valid a promise to pay the debt of another, would be to hold that the promise need not be in writing in any case. On the other hand, if the consideration of the promise was beneficial to the promisor, and we should refuse to enforce it because it was not reduced to writing, we should allow the promisor to retain the benefit, and yet refuse to comply with his promise. This would be to enable him to commit a fraud. It is on this reasoning the rule is settled, that if the promise is founded on a new consideration, beneficial to the promisor, it is not within the statute of frauds, and may be enforced, although not reduced to writing.

Let us test this verbal promise by this rule. Mrs. Black employed Colclough to act as her attorney, in removing Harris and having letters of administration issued to her; but she paid him for his services. What legal benefit, then, resulted to her from her promise to pay the debts that her son owed, and which were held by Colclough for collection? When this case was before us at a previous term, we said, that we could not see that it was beneficial to the defendants' testatrix; and there is nothing disclosed by the bill of exceptions as the case is now presented, that enables us to discover any legal benefit resulting to Mrs. Black from the consideration of the promise, that will take it out of the statute of frauds. The verbal promise is therefore within the statute, and consequently void.

Let the judgment be affirmed.

NOTE.—This opinion was prepared by the late Chief Justice, and was adopted as the opinion of the court, and delivered by CHILTON, C. J.

STOKES *vs.* JONES.

1. A voluntary deed, made to hinder, delay and defraud creditors, may be avoided in a court of law, by a creditor of the grantor's or a *bona fide* purchaser for a valuable consideration.
2. When the question is one of fraudulent intention in the execution of the deed, the court cannot pass upon the effect of the testimony, but must leave the question of fraud *vel non* to the decision of the jury; but when the bill of exceptions recites, that "it was expressly proved that the conveyance to the plaintiff was made to delay, hinder and defraud the grantor's then existing creditors," and that there was no conflict in the proof, it is not error to charge the jury, "that, if they believe all the evidence, they must find for the defendant."
3. A voluntary conveyance, with covenants of warranty, of lands in which, at the time of its execution, the grantor had not such an interest as could be subjected by his creditors either in law or equity, but to which he afterwards acquired title, is void as to creditors and subsèquent *bona fide* purchasers, if made to hinder, delay and defraud the grantor's creditors; a voluntary fraudulent estoppel is impotent to defeat the just claims of creditors and *bona fide* purchasers.
4. Where a voluntary conveyance from father to son, made to hinder, delay and defraud the grantor's creditors, contains a condition that the grantor shall, during his life, remain with the grantee and be supported by him, and the grantee at the time of its execution is an infant of tender years, and does not accept or in any way bind himself to the performance of the condition until after a sale by the grantor to a *bona fide* purchaser for a valuable consideration, his subsequent acceptance and part performance of the condition cannot relate back so as to defeat the intervening sale to the *bona fide* purchaser.

ERROR to the Circuit Court of Greene.

Tried before the Hon. THOMAS A. WALKER.

EJECTMENT by the plaintiff against the defendant in error. It appears by bill of exceptions, that the land in controversy was originally purchased from the Government of the United States by one McCarty, under the credit system; that having made partial payment, and obtained from the land office certificates of such purchase and payment, McCarty transferred his interest in the same to John Stokes, Sr., who, while he thus held the land, executed to his children a deed, in which he recites, that, for and in consideration of the love and affection which he bore for his children, therein named, and for one dollar by each of them in hand paid, and for divers

other good reasons, considerations and causes him thereunto moving, he gave, granted, conveyed, &c., to his children, severally named in the conveyance, the respective property set apart and designated as the share of each; and, after making a conveyance of real and personal estate to several of the children, the grantor conveys to the plaintiff the land in controversy. The deed contains a general clause of warranty, as to the title conveyed to the respective grantees. The conveyance is subject to the condition, that the grantor and his wife should remain with the said children, and be by them supported for and during their lives.

The deed appears to have been acknowledged before the clerk of the County Court, and recorded on the same day of its execution; and on the day following was taken into the possession of Willis B. Stokes, who paid $3 for its execution and $2 for recording it, and who retained it in his possession until within a short period next before the commencement of this suit. It appears that said Willis was the only one of the children who had attained the age of twenty-one years when the deed was made, the plaintiff then being of the age of eleven years, and residing with the grantor. The grantor and his wife continued to reside with their children, the grantees in the deed, and to receive from them assistance and support, until the death of Mrs. Stokes; and he now resides with one of said grantees.

After the execution of said deed, the land in controversy was forfeited to the Government, by reason of the non-payment of the purchase money remaining due, and the same was afterwards entered by said John Stokes, Sr., the grantees in the deed furnishing a portion of the money with which the entry was made. A patent was issued to said John Stokes, Sr., and on the 30th January, 1847, the land was sold and conveyed by him to the defendant in this suit, for a valuable consideration. The proof conduced to show, that the land in controversy was wild, uncultivated, forest land, and had never been reduced into actual possession by any one.

It is stated in the bill of exceptions, that, at the time the deed to the children was made, the grantor was seriously involved in debt, and that said deed was made to delay, hinder and defraud the then existing creditors of the grantor. Sev-

eral circumstances were proved tending to establish a recognition by the plaintiff of John Stokes, Sr., as the owner of said land and property conveyed by the deed, after the conveyance was made; but it also appears the plaintiff was not then apprised of the execution of said deed, or of his rights under it.

It was also shown, that all the debts existing at the time of the execution of the deed to the children, had been paid off, and that a portion of the funds thus appropriated had been raised by the sale under execution of the personal property conveyed by the deed.

It is then stated in the bill of exceptions that, "on this testimony and these facts, there being no conflict in the proof, the court charged the jury, that, if they believed all the proof, they should find for the defendant." This charge was excepted to, and presents the subject matter assigned for error.

J. D. WEBB, for plaintiff in error:

1. The parties claim title from the same vendor. The plaintiff's deed is prior in point of time to that of defendant's, by nearly twenty years. The deed of the plaintiff is impeached for fraud, not in its execution, but as tainted with the intention to delay and defraud the grantor's existing creditors. If this were true, it would only render the deed voidable, and not absolutely void. 18 Ala. 737, and authorities there cited; 1 ib. 102. Some of the grantees still hold property conveyed to them by this deed.

2. If plaintiff's deed is only voidable, can he be prevented from a recovery in a court of law? The deed clothes him with the legal title, until it is made null and void by the action of a court of equity. See authorities above cited. Can he divest himself of the title with which he is clothed, in any other manner than by a conveyance or the act of a court of equity setting aside the deed. West v. Tilghman, 9 Iredell's Law R. 113; 16 Ala. 714.

3. The grantor's intention to commit a fraud on his creditors, was a question of fact to be ascertained by a jury. The court erred, in determining that the grantor's intention was to defraud his creditors. 9 Ala. 944; 17 ib. 611.

4. The court erred in deciding this deed void; because the

grantor, at the time of its execution, had no such title as could be sold either at law or in equity. The title was in the Government; he had not paid for it; and after the execution of plaintiff's deed, he actually forfeited it, and the land reverted to the Government. Story's Equity, 372, § 367.

5. The deed could not be declared void for fraud, unless the grantee participated in the grantor's meditated fraud on his creditors. 16 Ala. 574.

6. That this deed, though tainted with fraud in its inception, could and did become good by matter *ex post facto*, see this case in 18 Ala. 735. There the court recognize that doctrine, and say that the matter relied on to give it validity is the marriage of the son. That was one ground; but we then held, and now hold, that all the grantor's debt, existing at the time of the execution of the deed and contracted since, having been paid, and he being entirely solvent and free from debt, this purges the fraud, and is matter *ex post facto* to make the deed good. Story's Equity, 375, § 371.

7. This court will reverse the judgment of the court below; because, from the bill of exceptions it appears, that there was a conflict in the testimony offered. The plaintiff's deed is directly in conflict with the defendant's. Givens v. Harvin, 19 Ala. 491.

Wm. M. Murphy and E. W. Peck, *contra:*

1. The language of the bill of exceptions is: "It was expressly proved, that the said deed was made for the purpose of hindering, delaying and defrauding his then existing creditors;" and as to this, or to any other facts, there was no conflict of proof. A deed so made is voidable, as against subsequent creditors and purchasers. Stokes v. Jones, 18 Ala. 736.

2. "All the rights of the (plaintiff) son under the deed from his father, were gone by the forfeiture." 18 Ala. 736. The entry subsequently made passed no title to the son; it could not inure under a voluntary deed made before entry.

3. Plaintiff's deed is fraudulent upon its face, because it stipulates for a benefit to the grantor. A debtor has no right to make such a reservation, at the expense of his creditors, and with intent to defraud them. 18 Ala. 737. The deed is admitted to have been made in violation of law.

4. Defendant purchased without actual notice of plaintiff's claim; and indeed, the record shows that plaintiff himself was ignorant of his claim, and purchased a part of the same land from his father. See the case of Sterry v. Arden, 1 Johns. Ch. 266, where the English and American authorities are all collated.

5. The support of the grantor was not the consideration of the plaintiff's deed; it was made "for natural love and affection," and was conditional. The subsequent acceptance and performance of the condition by the grantee could not have the effect of defeating a prior *bona fide* purchaser.

CHILTON, C. J.—1. The first question presented by the record is, can a court of law avoid a deed in favor of a *bona fide* purchaser for a valuable consideration, which was made to delay, hinder and defraud creditors. The counsel for the plaintiff insists, that the deed can only be avoided for this description of fraud, in a court of equity, and that the fraud which will vitiate a conveyance in a court of law, must relate to its execution. There are cases where this general language has been held; as in the case of Mordecai & Wanroy v. Tankersley, 1 Ala. 102, where the learned judge in delivering the opinion, says: "There is no doubt that a deed may be vacated in a court of law for fraud; but the fraud must go to the execution of the deed, otherwise it would not be cognizable in a court of law." So in this case, when before us at a previous term, (18 Ala. 731,) it was said: "A fraud which will vacate a deed of lands in a court of law, must relate to the execution of the deed."

In the first case, the attempt was to impeach a deed, valid in its creation, by the subsequent fraudulent conduct of one of the parties to it; and in the second case, the language was used in reference to the argument that the plaintiff, by offering to buy a portion of the same land, had fraudulently induced the defendant to purchase, and had thereby created an estoppel. As applicable to the facts of each, the court very properly said, the fraud to be cognizable at law must relate to the execution of the deed; that is to say, if the title to the land actually vested in the purchaser, it is not, in a court of law, divested by the subsequent fraud; but it was certainly

not intended to affirm that a voluntary conveyance, conceived in fraud, and made to delay, hinder and defraud creditors, could not be avoided by a creditor or *bona fide* purchaser for a valuable consideration, in a court of law. Such a decision would oppose many adjudications of this court, as well as the views of elementary writers on the subject. The case of Carter v. Castleberry, 5 Ala. 277, is directly in point; as also Forrest & Lyon v. Camp, 16 ib. 642, and Johnson v. Thweat, 18 ib. 741. See also, Roberts on Frauds, pp. 72, 596; Gregg v. Lessee of Sayre and wife, 8 Peters, 252.

2. But it is objected to the charge, that inasmuch as the fraud complained of consists in the intention of the grantor, it should have been referred to the jury to ascertain whether that intention existed. When the question is one of fraudulent intent, the court cannot properly pass upon the effect of the testimony, but must leave the question to be solved by the jury, as to whether the act done was coupled with such intent. Thomas v. Degraffenreid, 17 Ala. 611; Castillo & Keho v. Thompson, 9 ib. 944. The case before us, by the peculiar phraseology of the bill of exceptions, is not obnoxious to this objection. It is said: "It was expressly proved, that the conveyance to the plaintiff was made to delay, hinder and defraud the grantor's then existing creditors." The proof establishing this conclusion is not set out, and there is no conflicting proof. It has often been said, that the bill of exceptions must be construed most strongly against the party excepting; and applying this rule of construction to the case before us, we are bound to conclude that the plaintiff conceded the sufficiency of the proof to establish the fraudulent intent; since, instead of setting out the proof which tended to establish the intent, (in which case the jury, and not the judge, must determine as to its effect,) he broadly states the effect of the evidence, and concedes that "it was expressly proved the deed was made to defraud the creditors of the grantor." If, therefore, the fraud was expressly proved, we are unable to perceive any error in the charge to the jury, that, if they believed the proof, the plaintiff could not recover. The charge, construed with reference to the fact stated in the bill of exceptions, was tantamount to an instruction that, if they believed it was expressly proved the deed

under which the plaintiff claimed was made to delay, hinder and defraud creditors, the plaintiff could not recover against the defendant, who was shown to have purchased the land from the fraudulent grantor, after the conveyance to the plaintiff, and to have paid a valuable consideration therefor. If the jury had found a special verdict, setting forth the facts stated in the bill of exceptions, the court might properly have pronounced judgment in favor of the defendant; for the law arising upon the facts stated, without the aid of inferences of other facts from them, is in favor of the defendant, and adjudges the title of the plaintiff against him void. Such being the case, and there being no conflict in the proof, there was no error in the charge, that, if the jury believed all the proof, (which, if true, established these facts,) they must find for the defendant.

3. But a very ingenious argument is urged by the plaintiff's counsel to establish the validity of his deed, notwithstanding the fraud. It is this: When John Stokes, Sr., conveyed the land to the plaintiff, he had neither a legal nor equitable title to it, and as the creditors who were attempted to be defrauded could not have subjected his interest in the land, either in law or in equity, to their demands, the case does not fall within the prohibition contained in the statutes of fraud of 13 and 27 Eliz.

We are aware that the adjudications upon this point are somewhat conflicting. Mr. Justice Story says, that after various discussions, the English courts have settled down upon the doctrine, that in order to make a voluntary conveyance void as to creditors, either existing or subsequent, it is indispensable that it should transfer property which is liable to be taken for the payment of debts. 1 Story's Eq. Jurisp. § 367, n. 1, (4 Ed.) This learned author, however, fails to give any decisive opinion of his own as to the soundness of the English rule. On the other hand, Mr. Chancellor Kent ably combats the doctrine, and vindicates the justice and policy of the rule which requires courts of equity to afford relief, in cases of fraudulent alienations of property, whether such property could be reached by execution at law or not; for, otherwise, a debtor might convert all his property into stock or choses in action and settle them upon his family, set-

ting his creditors at defiance. Bayard v. Hoffman, 4 Johns. Ch. Rep. 452; ib. 687; 1 Story's Eq. § 368, n. 1.

The latter doctrine is sanctioned by this court. See Gannard et al. v. Eslava, 20 Ala. 732. But it is unnecessary to dwell upon this point, or review the cases which bear upon it, inasmuch as the previous decision in 18 Ala. 734, is decisive of it. We there held, that if the deed from John Stokes, Sr., to his son (the plaintiff) was fraudulent, it could not, by virtue of the covenant of warranty contained in it, operate against his creditors or subsequent purchasers, so as to protect his future acquisition of title from them. The voluntary fraudulent estoppel is as impotent to defeat the just claims of creditors or *bona fide* purchasers for a valuable consideration, as the deed would be had it contained no covenant out of which the estoppel is supposed to arise. A party cannot do by circuity and indirection what the law forbids to be directly done. He cannot avoid the claims of creditors or *bona fide* purchasers, by conveying with warranty to defraud them, and afterwards acquiring the title. The deed being fraudulent, is void as to the defendant, and wholly inoperative, except as between the parties to it. "According to the greatest authorities," says Mr. Roberts, "a *covinous* conveyance of land is no conveyance as against the interest intended to be defrauded, and ought by the rules of good pleading so to be treated, where the party is seeking to avail himself of the statutes of fraudulent conveyances." Roberts on Fraudulent Conveyances, p. 596.

4. The deed in this case contained a condition, the acceptance and performance of which would have created a valuable consideration; but the grantee was an infant of tender years when the deed was made. He had not accepted it, nor in any way bound himself to the performance of the condition, before the sale of the land to the defendant. Indeed, he was not apprised of its existence until long afterwards. It was as to him, therefore, at the time of the subsequent sale, purely voluntary, and his subsequent acceptance and part performance could not relate back, so as to defeat the intervening sale to a *bona fide* purchaser.

Let the judgment be affirmed.

ABNEY, ADMINISTRATRIX, *vs.* PICKETT.

1. An administrator *de bonis non* is only entitled to the assets of the testator or intestate which remain in specie, unadministered by the executor or administrator in chief.
2. When the testimony is clear and without conflict, and it is only necessary to draw a legal conclusion from it, it is not error for the court to charge the jury, that, if they believe the evidence, they must find for the party whose case is thus made out.

ERROR to the Circuit Court of Sumter.

Tried before the Hon. TURNER REAVIS.

ASSUMPSIT by the plaintiff in error, as the administratrix *de bonis non* of Hardy Abney, deceased, against Martin Pickett, the defendant in error. The cause of action is thus endorsed on the writ: "This action is founded upon the following facts: Hardy Abney, in his lifetime, held and *owned* a note made by John M. Stewart, for about $230, payable to Jesse Cage; which note the defendant collected, and appropriated to his own use, since the death of said Abney." Common counts were added.

The bill of exceptions shows the following state of facts: On the first of January, 1844, John M. Stewart made to Jesse Cage his due bill, for $232 $\frac{37}{100}$; on the fourth of April, 1845, Hardy Abney, having said due bill in his possession, called on Stewart for payment of it, and received from the latter $82 $\frac{37}{100}$, in part payment of it; but at this time Abney did not claim the note as his own, but demanded payment on it as the note due to Jesse Cage. Cage sold the note to one Bissell for $50, to whom Abney went, representing himself as the friend and agent of Cage, and stating that Cage was drunk when he sold the note, and after paying Bissell the $50 advanced by him took the note into his possession; said note was never assigned, or otherwise transferred in writing to Abney. Abney died in the spring of 1845, and Cage in the following autumn. Letters testamentary on the estate of Abney were granted to one Hart, and Martin Pickett became the executor and sole legatee of Cage. Abney's executor, on obtaining a knowlege of the facts under which his testator got

possession of said note from Bissell, surrendered it to Pickett, as the executor of Page, and the latter paid him $50, the amount advanced by Abney to Bissell. For the sum thus received from Pickett Hart accounted, on the final settlement of his administration, on Abney's estate.

It was further shown, that said Cage was an illiterate man, and that Abney, as his friend, was in the habit of making settlements for him. When Abney died, no credit had been entered on said note for the 82\frac{25}{100}$ paid by Stewart; but on his making out an account, and verifying it, Hart, the executor, allowed it to him; and this appears in his final settlement. The note was never otherwise accounted for by him, than as above stated.

On these facts, the court charged the jury, that, if they believed the testimony, they must find for the defendant; to which the plaintiff excepted. The charge of the court is the only error assigned.

JAMES O. WILLIAMS, for plaintiff in error.

JNO. F. VARY, *contra.*

LIGON, J.—There is no error in the charge of the court. The proof is very clear, that the plaintiff's testator acquired the possession of the note as the agent of Cage, the payee, and that he claimed no interest in it. When Stewart made the partial payment, which he proves he did make, he testifies that Abney spoke of the note as due to Cage. It was never endorsed to Abney, and it is fair and legitimate to infer, that he only held it as agent for the payee until the time of his death. When he received the 82\frac{25}{100}$ from Stewart, he was overpaid the amount he advanced to Bissell to procure the note from him, and was left without any pretext on which to found a claim to the note, or any part of its proceeds; and his executor acted both rightly and prudently when he surrendered it to the executor of Cage, without attempting to litigate his title to it.

Again; the present plaintiff cannot set up any title to the proceeds of the note, even if it were in fact the property of Abney's estate, for she is an administratrix *de bonis non*, and it is well settled that such an administratrix is not entitled to

the assets of the testator's estate, except so far as they remain in specie, and unadministered by the executor. Here it is distinctly proved, that Hart had disposed of this note, accounting with the Orphans' Court for all that he had received upon it which properly belonged to his testator's estate, and receiving credit in his account for the sum he was compelled to pay out on account of moneys which testator had received on it, above the sum he had advanced to Bissell. If he had acted improperly in respect to it, he alone was accountable to the representative or legatees of the estate of Abney. He had, in fact, fully administered upon it. Swink's Admr. v. Snodgrass, 17 Ala. 653, and authorities there cited.

But it is contended that the facts did not authorize the court to charge so pointedly in favor of the defendant. We have repeatedly held, that where the testimony is clear, and without conflict, and it is only necessary to draw a legal conclusion from it, it is not error for the court to charge the jury, that if they believe it, they must find for the party whose case is thus clearly made out; and such is this case. Hopkins v. Scott, 20 Ala. 179, and authorities there cited.

There is no error in the record, and the judgment is affirmed.

PRICE *vs.* PICKETT ET AL.

1. Rents received by defendant under an adverse holding, cannot be recovered by the rightful owner in assumpsit for money had and received; but if the holding is not adverse, they may be recovered in that form of action.
2. The right to emblements does not obtain until the seed is sown, and does not include the costs of preparing the ground for the reception of the seed, when the term is determined by the death of the tenant for life before the seed is actually sown.
3. Tenants in common of land may sue jointly in assumpsit for money had and received to recover the rents.
4. When the life estate falls in before the end of the year for which the land is leased, the remainder-man is entitled to the entire rents from the death of the tenant for life to the end of the year, subject to the right of emblements.

ERROR to the Circuit Court of Marengo.
Tried before the Hon. JOHN D. PHELAN.

ASSUMPSIT on the common counts against the plaintiff in error by Joseph Pickett, Albert A. Dumas and Eliza, his wife, for the recovery of rents.

It was admitted on the trial, that Reuben Pickett, who was the father of the plaintiffs, Joseph Pickett and Eliza Dumas, in his lifetime owned and was possessed of a certain tract of land in Marengo county, and that he died in 1840, leaving a widow and the said two children; that the widow afterwards married the defendant, Price, and subsequently to her marriage with him claimed dower in the said land, which was duly allotted to her; that the defendant took possession of the part thus allotted to her, and rented it to one Thomason for three years, commencing on the first of January, 1846, for the sum of one hundred and twenty-five dollars per annum, payable at the end of each year; that Thomason took possession, and cultivated said land during the years 1846 and 1847, and paid the rent for those years to the defendant before the commencement of this suit; that the defendant's wife, the widow of said Reuben Pickett, died on the 13th of March, 1847, leaving the said Joseph and Eliza, children of said Reuben, surviving her; that said Eliza had intermarried with the plaintiff, Albert A. Dumas; that Thomason had made preparations, before the death of Mrs. Price, for planting all the land rented by him, but had only at that time planted about one tenth of it, which was sown in oats.

Upon these facts, the court charged the jury, that the plaintiffs were entitled to recover nine tenths of the money which the defendant had received for the rent of the land. To this charge the defendant excepted, and he now assigns it for error.

WM. M. BROOKS and I. W. GARROTT, for plaintiff in error:

1. The tenant was entitled to emblements, the right to which is given for the encouragement of industry and agriculture. This right certainly cannot extend only to the land actually sown or planted; the spirit and equity of the law includes also the land which has been prepared for the reception of the seed. The cost and labor of sowing is light, compared with that of preparing the ground for the reception of the seed. Black. Com. § 123; 2 McCord's Ch. R. 85.

2. Assumpsit for money had and received does not lie, under the facts disclosed in this case. The title cannot be tried in this form of action; nor rents recovered which the defendant obtained through a claim of title. Chitty on Contracts, 478.

3. The plaintiffs were tenants in common after the death of Mrs. Price, and could not join in this action. Each was entitled to his separate action against the lessee or person receiving the money for him. 2 Bouv. Inst. 310; 3 Stephens' Nisi Prius, 2726; Archbold on Landlord and Tenant, 110.

No counsel for defendants.

GOLDTHWAITE, J.—It is true, that the title to land cannot be tried in an action of assumpsit for money had and received; and for that reason, rents which have been received under an adverse holding cannot be recovered by the rightful owner in this form of action. But where the possession is not adverse, the true owner is entitled to recover the rents which have been received by another; in such case, it is money had and received to the use of the owner; and, as the person to whom the rent was paid would be compelled to account in equity, he may also be held responsible in the equitable action for money had and received. Monypenny v. Bristow, 2 Russ. & M. 117. Upon the case made by the record, no question could have been raised in the court below upon the title, as the bill of exceptions shows that the title after the death of Mrs. Price was in the plaintiffs, and there is nothing to show that any adverse claim was set up by the defendant.

In relation to emblements, the right of the tenant was unquestionably conferred for the encouragement of agriculture: but this right has never been held to obtain until the seed is sown, and the common law has drawn a distinction between the right to emblements and the costs of the preparation of the ground for the reception of the seed; as where the tenant for will is ousted after ploughing and manuring the land, he wholly loses his costs and labor, although if he had planted he would have been entitled to the emblements. Bro. Ab. Title, Emblements, 7. If, therefore, the term of the lessee was determined by the death of the tenant for life, he would

only be entitled to the emblements of the land then seeded. Thompson v. Thompson, 6 Mun. 518.

We are also satisfied, that the plaintiffs below properly sued in their joint names. They were tenants in common, and might join in any action on a contract in relation to their estate—1 Chitty's Pl. 9; as in an action of debt for rent—1 Co. Lit. 317;—although they must sever in an avowry for rent; and the reason is, that the avowry savors of the realty, but until the distress and avowry the rent is in the personalty. Co. Lit. ib.

The charge of the court, that the plaintiffs, upon the facts admitted, were entitled to recover nine tenths of the rent received by the defendant, cannot be sustained. The land was rented for the year 1847, commencing on the first of January. The lease was determined by the death of the tenant for life, in March, 1847; and the land which was actually seeded by the lessee, was about one tenth of the whole tract. Upon this portion, the lessee was entitled to the emblements; and for the whole land, subject to this right of emblements, the plaintiffs were entitled to rent from the seventeenth of March, 1847, and that portion, if received by the defendant, there being no claim of title, could be recovered by the plaintiffs in this action. But as this amount was not positively proved, and was only to be inferred from the facts admitted, the court could not determine it as a legal result, and say that the amount received by the defendant for less than ten months was nine tenths of the rent which was paid for the whole year. The rent received by the defendant for the land, from the determination of the lease in March to the end of the year, was a question for the jury to determine.

For this error, the judgment is reversed, and the cause remanded.

POWELL *vs.* HADDEN'S EXECUTORS.

1. When one enters into the possession of land under a contract of purchase, and afterwards agrees to pay rent for the year in consideration of the rescission of the contract, the agreement creates the relation of landlord and tenant, and gives the landlord a lien upon the crop, and the right to enforce it in a proper case by process of attachment.
2. The lien for rent under the statute applies to crops grown on the land after the relation of landlord and tenant is established, although they may have been planted previously to the existence of that relation.
3. When the contract of purchase is rescinded after the vendee has taken possession of the land, and he agrees to pay rent for the year in consideration of the rescission, it is immaterial, so far as the landlord's lien for the rent already accrued is concerned, whether any accrues after the rescision of the contract.
4. In a trial of the right of property, the assessment by the jury of the value of the property is mere surplusage.
5. When the judgment entry describes the plaintiffs in *attachment* as "plaintiffs in *execution*," and declares that the property levied on was found "subject to plaintiffs' *execution*," instead of "*attachment*," the error is a mere clerical misprision, and will be considered as amended in the Appellate Court.

ERROR to the Circuit Court of Sumter.

Tried before the Hon. TURNER REAVIS.

This was a trial of the right of property to some corn and cotton, which was taken under attachment as the property of one Samuel Lewis, at the suit of Elizabeth Hadden, and was claimed by Powell, the plaintiff in error. Mrs. Hadden died pending the suit, and it was revived in the name of her executors, the defendants in error.

There was testimony tending to show, that Mrs. Hadden had sold to said Lewis a certain tract of land, had executed to him her title bond, and had taken his notes for the purchase money; that about the first of August, 1846, Lewis proposed to Mrs. Hadden's agent that they should rescind the contract, to which the agent assented, upon the agreement on the part of Lewis to pay rent for the land; that this agreement of rescission was not consummated, until sometime in October following, when the notes and title bond were respectively surrendered. The corn and cotton in controversy were the produce of this land during the year 1846.

There was also evidence tending to show, that Powell,

about the first of August, 1846, had purchased from Lewis his crop of that year, to be paid for in goods, a part of which had already been received by Lewis, and the remainder to be afterwards taken up by him at Powell's store. It was proved that the month of October, when the contract of purchase was rescinded, was earlier than the conclusion of cotton picking time. The attachment was levied in January, 1847, before the crop had been removed from the land; but there was no further proof, as to whether Lewis continued to occupy the land after the rescission aforesaid.

On this state of facts, the court charged the jury: "That, if they were satisfied from the evidence that the contract for the sale of the land, between Lewis and Mrs. Hadden, was rescinded in October; that Lewis agreed to pay rent from that time, as well as from the time of purchase; that the cotton in controversy was growing or ungathered upon the premises, at the time of the agreement to pay rent; and that the agreement to pay rent was made before the completion of the sale to the claimant; then the cotton was subject to the attachment;" to this charge there was no exception.

The claimant asked the court to charge the jury as follows:

"1. That the landlord has no lien for rent under the statute, except for crops grown on the land after the relation of landlord and tenant has begun to exist." This charge the court gave, but with this explanation: That the court did not mean by the term "grown" that the crop must be planted after the relation of landlord and tenant has commenced; but that, if the crop is growing or ungathered upon the rented land, when such relation commenced, a lien attached upon it for the rent which accrued from that time.

2. If the jury believe that, upon the rescission of the contract in October, it was agreed between Lewis and Mrs. Hadden's agent that that was a final settlement between her and Lewis, then, in the absence of further proof, this would rebut the presumption that Lewis remained on the land until the end of the year. This charge the court also gave; but told the jury, that, if they believed from the evidence that Lewis agreed to pay rent from the time of the contract of purchase, it was not material, whether he remained on the land until the end of the year or not.

3. That, in the absence of proof that Lewis remained on the land after the rescission of the contract of sale, in October, 1846, no presumption would arise that he remained on the land, as tenant, after that time. This charge the court also gave; but told the jury, that, if they were satisfied from the evidence that Lewis was to pay rent from the time the contract of sale was rescinded, as well as from the time of the contract of sale, it was not material, whether he remained on the land after that time, as tenant, or not."

The defendant excepted to each explanation and qualification of the charges asked.

The judgment entry is as follows, after the usual recitals: "Upon their oaths do say: 'We, the jury, find the issue in favor of the plaintiffs in execution, and that the lot of corn and cotton is subject to the plaintiffs' execution; and we assess the value of said lot of corn and cotton, at twenty dollars. It is, therefore, considered by the court, that said lot of corn and cotton, of the value aforesaid, be adjudged and considered subject to the plaintiffs' execution, and condemned to satisfy the same,'" &c.

The errors assigned are:

1. That the court erred, in rendering judgment on the verdict, as shown by the record, against the plaintiff in error;

2. That the court erred, as shown by the bill of exceptions.

BELSER & RICE, for plaintiff in error.

R. H. SMITH, *contra.*

PHELAN, J.—The argument of the counsel for plaintiff in error, contending that the process of attachment, given by statute for the recovery of rent, does not lie except in cases where the relation of landlord and tenant exists; and further, that this relation is not created between vendor and vendee of land, when the vendee has occupied the land, and a rescission of the sale afterwards takes place, and there remains an unsatisfied demand for use and occupation, may be conceded to be true, and yet, not affect a case where that very relation is created by the contract of the parties. The proof in this case was, that, as an inducement on his part to procure the consent of Mrs. Hadden to rescind the contract for the sale of

the land, Lewis agreed to pay rent for the land. By this, the relation of landlord and tenant was created by express agreement. To agree to pay for the use and occupation of the land *eo nomine*, to pay rent, was to agree to establish between them the relation of landlord and tenant, and to bring with it, among other incidents, a lien upon the crop, and the right to the process of attachment in a proper case to enforce that lien. Clay's Dig., 506.

Against the correctness of the explanation given by the judge to the first charge asked, it is insisted, that the charge as qualified is affirmative, and entirely overlooks the defence set up by Powell, that there had been a *bona fide* sale of the crop to him before the rescission was consummated, even if it should be admitted that the relation of landlord and tenant was created by the agreement to rescind the contract for the sale of the land.

In the first place, the charge is not affirmative in the sense in which I understand that term; certainly it is not a charge like that which is called an affirmative charge in the case of Roland & Heifner v. Ladiga, 21 Ala. The court was requested by the counsel for Powell to charge that "the lien for rent under the statute" only existed in respect "to crops grown on the land after the relation of landlord and tenant has begun to exist." This charge the court gave; but explained to the jury, that they were not to understand by these words that the crop must be planted or first begin to grow, after the relation begun to exist, to make a lien good, but, that if the crop was then "growing or ungathered on the rented land," the lien attached, although it may have been planted previous to the existence of such relation. Now this charge is alleged to be erroneous, because it takes no notice of the defence set up by Powell, that he had purchased this crop of Lewis before Lewis agreed to pay rent to Mrs. Hadden on the rescission of the contract between them for the purchase of the land. The charge asked made but a single point, and the court, in the explanation which it gave, did not embrace any other, nor was it bound to do so. The explanation was proper.

That the defence set up by Powell was not overlooked in the instructions given to the jury is manifest, when we con-

sider the entire bill of exceptions. The court did give an affirmative charge, to which no exception was taken. In order to authorize them to find the corn and cotton subject to Mrs. Hadden's attachment, they were told, that they must be "satisfied from the evidence," amongst other things, "that the agreement (of Lewis) to pay rent was made before the completion of the sale to the claimant" (Powell) of his crop by Lewis. That defence then was no doubt fully considered by the jury.

The qualifications given to the two other charges asked of the court by plaintiff in error, are entirely proper, in view of the testimony relating to the rescission of the contract of sale between Lewis and Mrs. Hadden and his agreement to pay rent. The substance of both was, that it did not matter whether Lewis remained on the land or not after the rescission in October, so far as plaintiff's lien on the crop was concerned, if he agreed to pay rent for the land from the time of the making of the contract of purchase in January; the meaning of which I take to be this, speaking to the jury: If you find the crop subject to a lien for rent, which accrued before October, it does not matter, so far as this issue is concerned, whether any accrued after October or not. There was no error in this.

In Seamans v. White, 8 Ala., 656, it has been decided, that the assessment of the value of the property in a trial of the right of property, growing out of the levy of an attachment, is mere surplusage at all times. This disposes of the objection made to the verdict as assessing the value of the corn and cotton together, and not separately. It was not proper to do it either way.

The judgment below, describing the defendants in error as "plaintiffs in execution," instead of "plaintiffs" simply, or "plaintiffs in attachment," and declaring the property levied on to be subject to the plaintiffs' execution, instead of subject to plaintiffs' attachment, presents in these particulars mere clerical misprisions, which will be considered as amended.

The judgment below is affirmed.

RUTHERFORD *vs.* McIVOR.

1. In assumpsit to recover money over-paid by plaintiff to defendant, the fact of the over-payment being contested, defendant may show plaintiff's inability to make it; and for this purpose, an unsatisfied mortgage previously executed by plaintiff is admissible evidence, as a circumstance the weight of which must be determined by the jury.
2. Also, a letter written by plaintiff to defendant after the alleged over-payment was made, showing that plaintiff was at that time pressed for money, and that he had had an interview with defendant the day before it was written, respecting a sum of money which defendant was liable to pay, and claiming from him that sum only, is admissible evidence for defendant; but *it seems*, that the letter would be inadmissible, if written before the alleged over-payment was made.
3. Money voluntarily paid, with full knowledge of the facts, cannot be recovered back; but having the means of ascertaining the real facts, is not tantamount to actual knowledge of them.
4. When money is paid under a mistake of fact, it may be recovered in assumpsit without a previous demand.

ERROR to the Circuit Court of Macon.
Tried before Hon. ROBERT DOUGHERTY.

ASSUMPSIT by the plaintiff in error against the defendant, as the surviving partner of the firm of McLester & McIvor, attorneys at law, to recover money alleged to have been over-paid to them by mistake.

It appeared on the trial, that McLester & McIvor, as attorneys at law, had charge of several executions in favor of the Branch Bank at Montgomery, against persons residing in Macon county, which executions the plaintiff, who was the sheriff of said county, had received for collection. The plaintiff proved that, in November, 1848, he paid to McLester, at Montgomery, the sum of $2250, for which he took receipts in their firm name, specifying that the money was paid on Bank cases, and was to be accounted for on settlement of the same. He also introduced his execution docket, and proved the receipts of McLester & McIvor opposite to each case entered therein, one of which receipts was in the hand-writing of McLester, and all the others in the hand-writing of McIvor. Of these receipts the first was dated

February 17, 1849, and the last in November, 1849. "The whole evidence," as the bill of exceptions states, "tended to prove that the plaintiff had advanced and overpaid to McLester & McIvor, over two thousand dollars more than he was liable to pay;" and he also introduced proof tending to show that McLester & McIvor had only paid to the Bank the amount to which it was entitled on the executions. It appeared that McLester died in March, 1850; and it was not shown that the overpayment was ever mentioned to him at all, or that it was mentioned to McIvor until a short time before the commencement of this suit, and after McLester's death.

The defendant offered in evidence a mortgage executed by plaintiff to one Williams in 1844, on several slaves, for about two thousand dollars, which mortgage did not appear to be satisfied. To this evidence the plaintiff objected, but the court overruled his objection, and admitted the evidence; to which he excepted.

The defendant also offered in evidence a letter written by the plaintiff to said McLester, dated October 17, 1849, of which the following is a copy:

"My Dear Sir: Not knowing the result of the future, when at your house on yesterday, I supposed I could wait longer for the amount spoken of, than I find I can, without considerable inconvenience, as I am compelled to advance eight hundred dollars in specie for John McKenzie. Will you, therefore, do me the favor, to authorize Mr. McIvor to pay the amount, $322 75, in Georgia or Carolina funds, of the execution against Strange & Self, together with the Supreme Court costs, which I have advanced, it being returnable to the last term of that court. I am, Sir, truly yours,

"T. V. Rutherford."

The plaintiff objected to the introduction of this letter, but his objection was overruled, and he excepted. The bill of exceptions states that there was other evidence in the case, but does not set it out.

The court gave the following affirmative charges:

1. If the jury believe from the evidence that plaintiff, with a full knowledge of all the circumstances and facts, or with the means of acquiring such knowledge, voluntarily paid the money, he could not recover it back;

2. Plaintiff could not recover, unless he had demanded a settlement, or made a demand, before suit was brought.

The plaintiff excepted to each one of these charges, and he now assigns them for error, together with the admission of the evidence objected to.

N. W. Cocke, J. E. Belser and D. Clopton, for plaintiff in error:

1. The evidence admitted, conducing to show Rutherford's embarrassments, was, under the state of the facts, wholly irrelevant, and should have been excluded. 12 Ala. 823; 10 ib. 355; 3 English's R. 491.

2. The letter of Rutherford to McLester was also irrelevant, and should not have been admitted.

3. In an action for money paid by mistake, no demand need be averred or proven. Saunders on Pl. and Ev. 130; The Utica Bank v. Van Gieson and others, 18 Johns. 485; Hawley v. Sage, 15 Conn. 32.

4. To preclude the party, who has paid money under a mistake, from recovering it back, he must have paid it with a knowledge that it was not due; the mere means of knowledge is not sufficient. Chitty on Cont. 543–4, notes, and cases cited, (Edition 1851;) Browne on Actions at Law 378; 2 Smith's Lead. Cases 328, top, (2d Amer. Edition;) 1 Mood. & Rob. 293; 9 Mees. & Welsby 54; 4 Man. & Grang. 16; 8 Cowen 195; 1 Ala. 406; 5 ib. 292; 20 Wend. 174; 3 Shep. 108; 17 Ala. 262; 2 Denio 107; 1 Wend. 355.

5. No question is presented by the record growing out of the relation of McLester and McIvor, as attorneys of the Bank; if it were, the money overpaid can in no sense be considered the money of the Bank; nor can it be presumed that it was ever paid to the Bank. 3 Kelly's R. 90; 19 Conn. 550; 10 Peters 138; 9 Mass. 408; 3 M. & S. 348; Weeks v. Love, adm'r. 19 Ala. 25; 5 ib. 292.

Rice & Morgan, *contra:*

1. There was no error in the admission of the evidence objected to by the plaintiff. The fact of the over-payment of $2000, which the plaintiff alleged, being contested and denied, the defendant had the right to give in evidence any-

thing that would show it to be impossible or improbable; any thing that could throw suspicion on plaintiff's evidence; for, the most positive testimony may be overcome by circumstances of suspicion. 1 Gallison's R. 104; 2 McCord's R. 161; 2 U. S. Digest, 286, § 1877, 1878. The mortgage was admissible, to show that plaintiff's situation was such that he could not have paid out so large a sum of money without full knowledge. The letter was admissible for several reasons. It was written long after the alleged over-payment was made; it shows that the plaintiff was then pressed for money, that he had immediate use for $800, and yet that he only claimed $322 75 from McLester, as security for Strange.

2. Where money is voluntarily paid by a sheriff to attorneys at law, "on account of sundry *fi. fa's* in his hands," in favor of the attorneys' client, with a full knowledge of all the facts and circumstances, or with the means of acquiring such knowledge, he cannot recover it back from the attorneys. Peterborough v. Lancaster, 14 New Hamp. 382; West v. Houston, 4 Har. 170; 2 East's R. 470, cited and approved in 1 Ala. 406; 8 Iredell's Law R. 243; ib. 441; 9 Cowen's R. 674; 2 Robinson's (Va.) R. 664; 11 Ad. & El. 926; 4 Burr. 1984; 3 Barn. & Adol. 354; 4 Term R. 554; 5 English, 469. If this proposition is not universally true, it is certainly true when applied to the facts of this case. If the money was received by the attorneys, it was received for the Bank, and they are liable to the Bank for it. Weston v. Barker, 12 Johns. 276; 7 Har. & John. 157. The sheriff voluntarily made the payment, in advance, "on sundry *fi. fa's* in his hands," in favor of the Bank. The attorneys are liable to the Bank for the amount thus received, whether or not the sheriff ever collects anything on the executions; and a recovery against them in this suit, and satisfaction thereof, would not protect them from liability to the Bank. 11 Ala. 695; 7 ib. 308. It is not pretended that all the Bank executions in the hands of the sheriff, solvent as well as insolvent, have been collected, and the payment was made generally. It is certain that Rutherford cannot recover for an over-payment, when he fails to show that all the executions in his hands have been paid. By his voluntary payment, he has placed the attorneys in a situation of actual liability to

the Bank; and this estops him from a recovery against them. 11 Adol. & El. 926; 4 Term R. 554; 4 Burr. 1984.

3. The sheriff has no right to *advance* money on an execution in his hands to the plaintiff or his attorney. Such an advance would give him a personal interest in the executions, which he holds as an officer. It is against public policy and unlawful, to allow him to engage in any such traffic; "and no right can be derived from an unlawful act." Fambro v. Gantt, 12 Ala. 298; Rutland v. Pippin, 7 ib. 469; Roundtree v. Weaver, 8 ib. 315; Crutchfield v. Haynes, 14 ib. 49; Johnson v. McLaughlin, 9 ib. 551; 8 Humph. 288; 2 McCord, 470; 3 A. K. Marsh. 536; 4 Comstock's R. 449; 4 Wash. C. C. 297; 4 Denio, 63. Even where the sheriff pays an execution, in discharge of an official liability incurred by himself, he cannot recover the amount from the defendant, whose debt he has thus paid, unless the latter authorized the payment, or adopts it. The mere payment, *per se*, does not render the defendant liable to him. 13 Ala. 357. How then can a mere voluntary payment in advance by the sheriff, on executions in his hands, to the plaintiff's attorneys, authorize a recovery by him against them? Kenan v. Holloway, 16 Ala. 57.

4. In all such cases as this, the means of acquiring knowledge is regarded in law as actual knowledge. The law will not permit a man "to shut his eyes, and remain voluntarily in ignorance of facts within his reach," and then claim its protection against the consequences of such ignorance. Want of notice of a fact, which is the result of the lack of that diligence which the law requires for its ascertainment, furnishes no ground for protection, even in a court of chancery. Chapman v. Glassel, 13 Ala. 55; Jenkins v. Eldridge, 3 Story's R. 181, 297; Randall v. The State, 4 Sm. & M. 351; 4 New Hamp. 382; 4 Har. 170; 6 Peters, 622; 9 Ala. 208.

5. If the plaintiff had any right at all to recover, he certainly could not sue until he had made a demand. Wellborn v. Sheppard, 5 Ala. 674; Stewart v. Frazier, ib. 114; 14 New Hamp. 352; 15 Maine, 327.

DARGAN, C. J.—We cannot perceive that the court erred in admitting the testimony to which the plaintiff objected.

The mortgage from the plaintiff to Williams, it is true, has no connection with this case; and if there had been no contest as to the fact of an over-payment, the mortgage would have been entirely irrelevant. But the material inquiry was, whether an over-payment had been in fact made. This was the contested matter of fact, and we think that the defendant may show the inability of the plaintiff to make it; and if he can, of course, every circumstance tending to prove such inability may go to the jury, without regard to the weight or influence that may be attached to it. They are to judge of such circumstance; and although it may amount to little, or even nothing, in their estimation, yet, as it has a tendency to prove a fact that is admissible, we cannot say that the court erred in admitting it.

In reference to the letter written by the plaintiff to McLester, we think it was also admissible. When a plaintiff has introduced evidence tending to prove a material fact, it is certainly competent for the defendant to give in evidence any fact that will impeach or impair the weight of the evidence thus introduced against him, or that will render the truth of the material fact more doubtful. This rule of evidence, we think, rendered the letter admissible; for we must infer from the bill of exceptions, that the over-payment, if made at all, was made before the letter was written, and it shows that the plaintiff was pressed for money; and also, that, on the day before it was written, the plaintiff and McLester had had an interview, respecting a sum of money which McLester was liable to pay, and yet the plaintiff claimed of him only $322 75. This, of course, is a circumstance tending to prove that, at the time the letter was written, the plaintiff did not know of the mistake; and his being embarrassed in pecuniary matters, and not having discovered the mistake for some time after the over-payment was made, is a circumstance that may go to the jury, to be by them considered in determining whether the mistake was in fact made. It is true, that the over-payment may have been in fact made, and it may not have then been discovered; and if this were the case, then the letter could have no influence with the jury. Yet, in deciding whether the over-payment was made, they may take into consideration the circumstance that the

mistake was not discovered for a considerable time after it was made. The importance, however, to be attached to that circumstance is exclusively for them.

We have said, that we were bound to infer from the bill of exceptions that the over-payment, if made at all, was made before the letter was written; and we deem it proper to add, that if, in point of fact, the over-payment was not made before the letter was written, then the letter ought not to be allowed to go to the jury, because, in that aspect of the case, it could tend to prove no legitimate fact or circumstance.

As respects the instructions given by the court to the jury, we do not think they can be sustained as correct expositions of the law. All the authorities agree in this, that if one pay money voluntarily, with a full knowledge of all the facts, he cannot recover it back. I might refer to any number of cases, to show this to be the rule; but I deem it unnecessary, for none of the cases controvert it. But I cannot yield my assent to the proposition, that the means of ascertaining the real facts of the case are tantamount to actual knowledge of them. If this were the rule, then it would be but rare that money paid by mistake could ever be recovered back. For instance; if, in the settlement of an account, a mistake in the calculation was made, it could not be afterwards corrected by suit, because the parties, having competent knowledge of figures, had the means of knowledge; and the mistake being the result of negligence, rather than the want of knowledge, the parties would be bound to abide by it. The recent and best authorities, I think, settle the rule otherwise.

In the case of Kelly v. Solari, 9 Mees. & W. 53, the facts were these: The defendant's testator had effected an insurance upon his life, but by mistake had failed to pay the last quarterly premium falling due before his death. This was made known to two of the directors of the Insurance Company, and one of them wrote on the policy the word "lapsed." After the death of the testator, his executor applied for the money; and the directors who had been informed that the policy had lapsed, together with another director, who had not been informed of it, paid the money; and the suit was afterwards brought by the company, to recover it back. On the trial, the two directors who knew all the facts swore, that,

at the time the money was paid, they had forgotten that the policy had lapsed. Upon these facts, the Chief Baron who presided at the trial, instructed the jury, and directed a non-suit, with leave to move for a new trial. The motion was heard before the Court of Exchequer, and in delivering his opinion the Chief Baron said: "I certainly laid down the law too broadly to the jury, when I said, that, if the directors once knew the facts, they must be taken still to know them, and could not recover by saying that they had forgotten them. I think the knowledge that will disentitle a party from recovering must mean, a knowledge existing in the mind at the time of the payment." In this opinion the whole court concurred, and the rule for a new trial was made absolute.

The same rule is recognized in the case of Lucas v. Worswick, 1 Moo. & Rob. 293; and in the case of Waite v. Leggett, 8 Cowen, 195, the Supreme Court of New York held, that, to deprive a party of the right to recover back money paid, on the ground of his knowledge that it was not due, it should appear that the money was paid with a knowledge that it was not due; and the fact that the party had the means of knowing that the money was not due, was no answer to the action, provided there was a mistake of fact in the payment.

These decisions, in my judgment, announce the correct rule; and although decisions may be found which indicate a different rule, and that the means of ascertaining the real facts are tantamount to a knowledge of them, yet I cannot yield to them, and I can but think that they are in conflict with the law; for, on examining the cases in which a recovery has been allowed on the ground of a mistake, I will undertake to say, that, in a large majority of them, the party paying had the means within his reach to ascertain the true facts of the case. The court erred in instructing the jury, that, if the plaintiff had the means of knowledge, he could not recover.

The second charge, we think, was also erroneous. When money is paid in consequence of a mistake of fact, the party receiving it is liable for it, as for money had and received for the use of the party who paid it. It is immediately due, and

the bringing of the action is a sufficient demand; or rather, no demand need be made before the suit is brought, to entitle the party to a recovery. See the cases of The Utica Bank v. Van Gieson, 18 Johns. 485, and Hawley v. Sage, 15 Conn. 52.

For the errors in the instructions of the court to the jury, the judgment must be reversed, and the cause remanded.

NOTE.—This opinion was prepared by the late Chief Justice before his resignation. The court, in its present organization, having fully examined and sanctioned it, LIGON, J., delivered it as the opinion of the court.

CHILTON, C. J., did not sit.

CASE & PATE *vs.* MOORE.

1. When judgment is rendered by a justice of the peace against a garnishee on his answer, who takes the case to the Circuit Court by appeal or *certiorari*, he is entitled to the privilege of answering over; but he will be held to have waived this privilege if he does not claim it by offering to make further answer.
2. When the proceedings are commenced in the Circuit Court, judgment by default cannot be rendered against a garnishee, until the fourth day of the term; but this does not apply to cases brought into that court by appeal or *certiorari* at the instance of the garnishee.
3. A judgment rendered against a garnishee will be reversed on error, when the record does not show that the plaintiff had obtained judgment against the original defendant.

ERROR to the Circuit Court of Lawrence.

Tried before the Hon. THOMAS A. WALKER.

DAVID P. LEWIS, for plaintiff in error:

1. The case should have been tried *de novo* in the Circuit Court. Gayle v. Turner, Minor's R., 306; Colman v. Waters, 3 Porter, 381.

2. Before Moore could obtain a judgment final in the Circuit Court, it was necessary for him to take the proper steps in that court to entitle him to it. Case had a right to answer

over. Colman v. Waters, 3 Porter 381. On his failure to answer, Moore should have taken a judgment *nisi* on the fourth day of the term. Jones v. Hart & Bosworth, 2 Ala., 73. Moore should have exhibited his judgment against Elkins, and the record should show it, before he could take judgment against Case & Pate. Gaines v. Beirne & McMahan, 3 Ala., 114; Leigh v. Smith, 5 ib., 583.

3. A judgment by default against a garnishee on the third day of the term to which he is summoned, is erroneous, and will be reversed on error. Randolph v. Peck & Co., 4 Ala., 389.

R. O. PICKETT, *contra:*

1. The statute contemplates the *viva voce* examination of the garnishee in open court; but this may be dispensed with, and the answer received in writing. Here the garnishee had answered in writing, and the court did not err in rendering judgment on such answer. Gaines v. Beirne & McMahan, 3 Ala., 114.

2. The case of Randolph v. Peck, 4 Ala., 389, is not applicable to this case.

CHILTON, C. J.—Case was summoned by process of garnishment to answer what he was indebted to one Elkins, against whom Moore had obtained a judgment before a justice of the peace, and filed his answer in writing, admitting an indebtedness to the amount of thirty dollars, dated 22d February, 1851. The justice rendered a judgment against him for that sum. It appears from the affidavit of Moore, that his judgment against Elkins was for the sum of twenty-four dollars and eighty-five cents, and was rendered the 23d December, 1848, before the justice who gave judgment against the garnishee. Case obtained a *certiorari* and *supersedeas*, to remove the case to the Circuit Court, setting forth, in his petition, that his supposed indebtedness accrued by reason of the purchase of certain property of which he had been deprived by title paramount, as ascertained by a trial at law since he made his answer. The cause being sent up to the Circuit Court, a judgment was rendered against the garnishee and his security on the *certiorari* bond, for the sum of thirty-three

dollars and eighty cents, the judgment entry reciting, that Moore, the plaintiff, came by his attorney on the third day of the term, "and the defendant failing further to defend his said answer as garnishee in the court below, the plaintiff moves the court for a judgment according to said answer; whereupon it was considered by the court that the plaintiff recover," &c.

It is contended that this judgment was erroneous, because the case was to be tried *de novo* in the Circuit Court, and that consequently the garnishee had a right to answer over; that failing to answer, the plaintiff should have proceeded to obtain a judgment *nisi* and have awarded a *scire facias* to make it final; but that such judgment, by default, could not be properly rendered on the third day of the term to which the *certiorari* was made returnable. It is further insisted by the counsel for the plaintiff in error, that the record should show that Moore had obtained a judgment against Elkins.

It is true that the case was to be tried *de novo* in the Circuit Court, and that the garnishee was entitled to the privilege of answering over, Colman v. Waters, 3 Port. Rep., 381; but it is equally true, that where a judgment has been rendered against him before the justice, and he takes the case up to avoid the judgment, he may waive and does waive this privilege unless he claims it. The plaintiff in the garnishment may, by the production of the evidence of his judgment against the debtor and the written answer of the garnishee admitting an indebtedness, entitle himself to judgment against the garnishee, who must be presumed to have waived his right to answer over by not offering to make further answer.

Neither can the objection, that the judgment was rendered against the garnishee on the third day of the term, be supported. This applies to proceedings in garnishment commenced in the Circuit Court, and not to cases brought up on appeal or *certiorari*, at the instance of the garnishee, to that court. Were we to give the statute the construction contended for, the result would be that garnishees against whom judgments might be rendered before justices of the peace, could always obtain more than six months' delay, by appealing to the Circuit Court and failing to prosecute such appeal. In legal contemplation, the party who takes the appeal or

brings the case up by *certiorari*, is in court, and cognizant of the proceedings had in the cause; certainly he should not be allowed to claim any benefit as based upon his voluntary absence. The case, when placed upon the docket of the Circuit Court, like other cases of appeal, stands for trial when it is regularly reached.

The last ground of objection taken by the counsel for the plaintiff in error, namely, that the record fails to show that Moore had obtained a judgment against Elkins, is well taken, and is fatal to the judgment in this court. This is a summary, statutory remedy, and the record should affirmatively show that the proceedings conform to the statute. This might have been done by the recitals of the record, had it been properly made up, without setting out the proof of the judgment; but in the absence of such recitals, we cannot aid the proceedings by intending that there was proof of a judgment. 2 Ala., 253; see also, Bostwick v. Kirkland & Beach, 18 ib., 80.

For this error, the judgment must be reversed, and the cause remanded.

SMITH, GUARDIAN, &c. *vs.* SMITH'S ADM'RS.

1. Whenever it is necessary to form an issue to ascertain whether an advancement has been made to a child, although the better practice would be, that the proceedings should be conducted in the name of the administrators as plaintiffs, and the party who contests the fact of advancement as defendant, yet, if the record shows that the question at issue was fairly presented and correctly decided, without objection in the court below, the defendant, if the decision is against him, cannot complain that the other distributees were the plaintiffs, instead of the administrators.
2. If a child receives either money or property from a parent, it will be *prima facie* an advancement, unless the presumption is repelled by the nature of the property, or by some other circumstances showing that it could not have been intended for that purpose.
3. When the record of the final settlement of an estate recites, that the guardian of the minor heirs appeared and claimed for them a distributive share, the recital is conclusive as to the fact of the appearance of the minors by their guardian, and such appearance would dispense with the necessity of notice.
4. When infants are interested in the distribution of an estate, they may be rep-

resented on the final settlement by their general guardian, unless he is an incompetent or unfit person.

ERROR to the Court of Probate of Chambers.

This writ of error is sued out to reverse a decree rendered by the said Court of Probate, on the final settlement of the estate of William C. Smith, deceased.

The record shows, that, at a regular term of said court, to which the settlement of said estate had been continued, the administrators appeared, and presented their accounts and vouchers for settlement; and that thereupon Sarah J. Smith, the plaintiff in error, guardian of the minor children of Solomon C. Smith, deceased, who was shown to be a son of the intestate, also appeared, and claimed for her wards one distributive share of said estate; that this claim was resisted by the other distributees, unless the property received by said Solomon C. in his lifetime, from the intestate, was brought in for distribution. The judgment entry recites the appearance of the parties as above stated, and that an issue was made up between them and submitted to the court, whether or not the said Solomon C. had received in his lifetime any advancement from his father, the said intestate. The record also shows the evidence submitted to the court on the trial of the issue, which it is unnecessary to set out here as it is substantially embodied in the opinion of the court; and upon this evidence the court decided, that the said Solomon C. had received from his father, as an advancement, a slave named Lucy, and her child; and ordered that the said slaves should be brought into the estate for distribution, or that the said children of Solomon C. should be forever barred from any portion of the said estate.

The record also shows, that, on the determination of this issue, the court proceeded with the final settlement of the estate, excluding the said children of Solomon C. Smith from all share in the same. The judgment entry recites the filing by the administrators of their accounts and vouchers for final settlement, forty days before the term of the court to which they were reported for allowance and settlement, and that personal notice thereof had been given to all the resident heirs of full age, and to the guardian *ad litem* of the minor heirs;

and no person appearing to contest the same, the court proceeded to make said settlement.

To reverse this decree, a writ of error is sued out in the name of "Sarah J. Smith, guardian of the minor heirs of Solomon C. Smith," and the errors assigned are:

1. That the issue as to the advancement to Solomon C. Smith was improperly made up;

2. The record does not show the appointment of a guardian *ad litem* for the infants, and his acceptance in writing of the appointment;

3. There was no sufficient notice of the final settlement;

4. The court erred in deciding, under the evidence in the case, that an advancement was made to Solomon C. Smith.

L. E. PARSONS and JOHN WHITE, for plaintiff in error.

FALKNER, *contra.*

GOLDTHWAITE, J.—The objection which is taken by the plaintiff in error, that the issue ascertaining the advancement was not made between the proper parties, cannot be sustained. It was competent for any of the other heirs of the intestate to raise the objection; and although it would be the better practice, whenever it is necessary to form an issue to ascertain whether an advancement has been made by the intestate, that the proceedings should be conducted in the name of the administrators as plaintiffs, and the party contesting the fact of the advancement as defendant, yet, if it appears from the record, that the question at issue was fairly presented, and correctly decided, without objection in the court below, the defendant, if the decision is against him, cannot complain that the other distributees were the plaintiffs, instead of the administrators. By not making the objection in the court below, he assented to the trial of the question in the shape in which it was presented; and after doing this, he will not be permitted to raise the objection before an appellate tribunal.

We think also, that the court below decided correctly in relation to the advancement. The evidence clearly shows, that the slave Lucy and her child were paid for with the money of the intestate, and that on two different occasions he asserted his title to them, in the presence of the child to whom

it was alleged they were advanced, who not only failed to deny his claim, but on the last occasion, by his language, admitted it. After this, we find them remaining in the possession of the child up to his death, a period of some four years, during which time they were used and controlled by him as his own property. The testimony also shows, that he disposed of them by will, made in the presence and with the knowledge of the testator, who, while he asserted his right to the other slaves disposed of by the same instrument, set up no claim to these. Under these circumstances, we can arrive at no other conclusion, than that the father had, before the death of his son, divested himself of the ownership of the slaves referred to, in favor of his son. The rule laid down by Mr. Justice Ormond in the case of Mitchell v. Mitchell, 8 Ala. 414, is, that if a child receives money or property from a parent, it will be *prima facie* an advancement under our statute, unless the presumption is repelled by the nature of the property, or by some other circumstances showing that it could not have been intended for that purpose. In the present case, the son is engaged in business for himself; is living apart from his father, in a situation requiring an advancement; and the nature of the property is such as a parent, having that object in view, would be likely to bestow. Instead of repelling the presumption, the testimony tends rather to fortify and strengthen it.

In relation to the question of notice: The record recites, that, on the day and at the term appointed for the final settlement of the estate, the administrators appeared, and presented their accounts, which are shown to have been previously duly reported and filed, for settlement; and also, that the guardian of the minor heirs appeared, and claimed for them a distributive share. These recitals are conclusive, as to the fact of the appearance of the minor heirs by their guardian; and as this legal appearance would dispense with the necessity of notice, the real question is, whether the minors who are interested in the distribution of an estate can properly be represented on its final settlement by their general guardian. We are not aware that this question is covered by any previous decision, and in the case of King v. Collins, 21 Ala., it is considered as one still open for adjudication. It is unnecessary to cite authorities to sustain the position, that, in general, the

appearance of an infant by such a guardian is good; and we think also, that, generally speaking, he feels a higher degree of responsibility in protecting the rights and interests of the ward, than the guardian *ad litem* appointed by the court, who seems usually to consider his duties as limited to a denial of all matters which may affect the rights of the ward, without resorting to any positive or active measures to secure them. It is true, when the general guardian is an incompetent or unfit person to represent the infant, it would unquestionably be the duty of the court to appoint a suitable person guardian *ad litem;* but in those cases in which the general guardian does appear, and is recognized by the court as the representative of the minor, we can perceive no good reason why the appearance should not be sustained.

It results from these views, that there is no error in the record, and the decree is affirmed.

BARRINGER ET AL. *vs.* BURKE.

1. Matters arising subsequently to the filing of the original bill cannot be added by way of amendment, but must be brought to the view of the court by supplemental bill.
2. When lands sold under execution are purchased and held by the trustee of a *feme covert* in trust for her, an offer by a judgment creditor to redeem under the statute, is sufficient, if made to the trustee.
3. An offer to redeem by a creditor who has a judgment then in force, which is afterwards reversed on error by the Appellate Court, does not entitle him to redeem under another judgment recovered on the same cause of action after the expiration of the two years.

ERROR to the Chancery Court of Tuskaloosa.
Heard before the Hon. W. W. MASON.

This bill was filed by Thomas J. Burke against the plaintiffs in error, to obtain the redemption of certain lands, which were sold under execution against James M. Dunlap, of whom the complainant claimed to be a judgment creditor.

The bill alleges, that the complainant obtained a judgment against said James M. Dunlap at the October term, 1846, of the

Circuit Court of Tuskaloosa county; that the said lands had been sold under an execution against said Dunlap, which was issued on an older judgment than complainant's, and were purchased by one Nancy McMillan, who was the plaintiff in said judgment; that said Nancy McMillan afterwards sold said lands to the defendant Barringer, as trustee for Mrs. Dunlap, the other defendant, and conveyed said lands to him as trustee; that complainant had made a tender to said Barringer of twenty dollars, the sum paid by Mrs. McMillan for said land at said execution sale, and the same sum paid by Barringer to her, together with ten per cent. advance thereon, and at the same time offered to credit his judgment against said Dunlap with the sum of $300, over and above the sum so tendered for redemption; that Barringer refused said tender and offer, and refused to allow plaintiff to redeem; that said sale under execution was made in September, 1846, and said offer to redeem in 1847, before the expiration of two years from the said sale; that Barringer also neglected and refused, for six months after said offer was made, to pay complainant said sum of $300, with which, as aforesaid, he had offered to credit his judgment against Dunlap.

The bill again makes a tender of the money, and prays that Barringer may be compelled to convey the land.

Barringer and Mrs. Dunlap are made defendants to the bill, and publication is prayed against the former, as a non-resident. Mrs. Dunlap answered the bill, admitting its most material allegations. She insists, however, that she is a *feme covert*, and gives the name of her husband, James M. Dunlap; that she has a separate estate, and that she advanced to Barringer the money with which to make said purchase out of her separate estate; that she is the beneficial owner of said land, and that the legal title only is in Barringer; and that the tender and offer to redeem, to be good in law, ought to have been made to her. She demurs to the bill, for want of proper parties, and for want of equity.

The complainant amended his bill, so as to make James M. Dunlap a party defendant. He also afterwards filed a supplemental bill, alleging that his judgment against James M. Dunlap, which was in force when the original bill was filed, has since that time been reversed by the Supreme Court;

that complainant has since brought a new suit against said Dunlap, on the same cause of action, and recovered another judgment, for a large amount than the first. This last judgment was recovered in 1850.

Mrs. Dunlap answers the supplemental bill, admitting the reversal of the first judgment, and demanding proof of the recovery of the second. She also insists, that no offer to redeem was or could be made under the second judgment, and that the tender and offer made under the first was not binding under the second judgment. She demurs to the supplemental bill, for want of equity, and because the case made by it "defeats the whole cause set forth in the original bill."

The proof sustains all the allegations of the original and supplemental bills. The Chancellor refused to dismiss the bill, held the tender sufficient, and decreed that complainant pay to the defendant the sum of $26 50, being the amount of the purchase money and ten per cent. thereon; and that, upon said payments being made; all the right and title of the defendants, in and to said lands, should vest in the complainant.

The errors assigned are:

1. That the court erred in rendering the decree shown, as the same is not authorized by the bill, answer and proof;

2. The court erred in refusing to dismiss the bill;

3. The court erred in refusing to sustain the demurrers to said original and supplemental bills, on the grounds set forth.

P. & J. L. MARTIN, for plaintiffs in error:

1. The tender was insufficient, because it was made to the trustee, instead of the *cestui que trust.* The land was purchased with Mrs. Dunlap's separate property, and was held by the trustee for her use and benefit. Barringer merely held the legal title.

2. No tender was made after the recovery of the second judgment; and none could be made under it, because the two years had expired before its rendition. The reversal of the first judgment destroyed the effect of the tender made under it. The complainant was not a *bona fide* creditor, within the meaning of the statute, until the rendition of his last judgment. Thomason v. Scales, 12 Ala., 309; 4 Humph., 371; McGavock v. Woods, 10 Yerger's Rep.

ORMOND & NICOLSON, *contra:*

1. The tender to the trustee was sufficient. The statute, Clay's Dig., 502, requires "the payment or the tender thereof" to be made to the "purchaser" of the land, "or to one claiming under him." Barringer, the trustee, was the purchaser, and complainant contends, was the proper person to whom the tender should have been made. There were but two persons who had any interest, Barringer and Mrs. Dunlap, who was a married woman; a tender to her would manifestly have been a nullity, as she could do no act which would prejudice her rights. If she had accepted the money, she could not have made the conveyance; and the whole scheme of the statute is, that the tender must be made to the person holding the legal title, and who can make the conveyance. Besides, if Mrs. D. had received the money, it would instantly have been the property of her husband, and it would have been the duty of the trustees to have repudiated the whole transaction, as its direct effect would have been to defeat the trust. It follows then that the tender to Barringer was well made, as he was the only person who could have received it without defeating the trust, and he was the only person who could make title.

2. Burke had reduced his debt against Dunlap to judgment before the tender was made, and it was a valid, subsisting judgment at the time the tender was made. Its *bona fides* was fully established at the time of tender. Scales v. Thomason, 12 Ala., 309. After the tender was made, however, and during the pendency of the present cause, a writ of error was sued out by Dunlap, and Burke's judgment reversed by the Supreme Court. Burke then instituted an action for money had and received, the cause of action being the same upon which his original judgment was founded, and recovered at the Fall term, 1850, of the Circuit Court, a judgment against Dunlap. The simple question then is, is the tender a good one, and can it be made available under the facts of the case. The fact that a second judgment has been obtained on the same cause of action, shows clearly that the reversal in the Supreme Court was upon a point not affecting the merits. The only requisition of the law is, that the person redeeming must be a *bona fide* creditor, that is, a judgment creditor.

The complainant was a judgment creditor at the time of the tender; he is so still. His character then as a *bona fide* creditor before the court is fully established. If, then, he was a *bona fide* creditor at the time the tender was made, and is so still, it seems to me his right to redeem is incontrovertible, unless, under the supposition that the judgment must keep up a continual lien; but our redemption law is not based upon such a principle. Pollard v. Taylor, 13 Ala., 604. As to rights acquired under voidable judgments, see Boren v. McGehee, 6 Porter, 432; Woodcock v. Bennet, 1 Cowen, 711.

Suppose that Barringer had accepted the money and made the conveyance; and finding out the defect in the judgment, had taken it up to the Supreme Court and reversed it; and that complainant had sued again, and procured judgment against Dunlap; could not complainant have defended successfully against any action brought against him to recover the land? For being in a condition to make a tender at the time he did, and being still in the attitude of a *bona fide* creditor at the time suit was brought, he would have a right to retain the land, being fully within the reasoning of the cases. Duncan v. Ware's Ex., 5 S. & P., 119; Roebuck v. Dupuy, 7 Ala., 486.

3. A supplemental bill was the proper manner to bring up the second judgment. Story's Eq. Pl., § 336.

PHELAN, J.—If the complainant desired to bring to the view of the court the facts connected with the reversal of the first judgment of Burke against Dunlap, and the rendition of the second, he could only do so by supplemental bill; since this is new matter, relating to the case made by the original bill, arising subsequent to the filing of that bill, and, therefore, not proper to be added by way of amendment of the original bill. Story's Eq. Pl., 268, *et seq.;* Mitford's, 49: Walker v. Hallett, 1 Ala., 379. The effect, however, of the new matter upon the case made by the original bill, remains to be considered.

The whole case then, as presented by complainant, Burke, is in brief as follows: Within the two years limited by law he offered to redeem the land purchased by Mrs. McMillan,

and sold by her to Barringer in trust for Mrs. Dunlap, in virtue of a judgment which he then held against James M. Dunlap, the defendant in execution, making said offer to Barringer, the trustee, and not to Mrs. Dunlap, the *cestui que trust;* after this offer to redeem, and after the filing of the original bill, the judgment of Burke against J. M. Dunlap was taken to the Supreme Court, on writ of error, by Dunlap, and reversed; subsequently to this a new action was brought by Burke against Dunlap, upon the same cause of action, and another judgment recovered before the final hearing in the court below.

Two questions present themselves: 1. Should the offer to redeem have been made to Barringer, who held the legal title, or to Mrs. Dunlap, the *cestui que trust?* 2. Will an offer by a creditor who holds a judgment at the time, which is subsequently reversed, but who afterwards brings a new suit on the same cause of action, and recovers a new judgment before the hearing in chancery, be held good, to entitle the party making the offer to the provisions of the statute, giving to creditors the right to redeem land which has been sold under execution?

When Barringer took the legal title in trust for the separate use of Mrs. Dunlap, who was then a married woman, he took it subject to all the conditions to which the law subjected lands "sold under execution." One condition was, to allow any *bona fide* creditor of James M. Dunlap, within two years from the time of the execution sale, to redeem the land that had been sold, by paying the amount bid at the execution sale, with ten per cent. interest per annum, and offering to credit the debtor with ten per cent. or more on the purchase money bid at said sale, and thereupon to convey, &c., to such creditor. The trustee in such a case is the only person that the law regards as having power to convey the legal title. Every trustee is bound to protect the interests of his *cestui que trust*, and in order to do this he is supposed to consult with him freely upon all matters touching his interest, before he does any act by which the *cestui que trust* may be affected. In doing what the law will compel him to do, he always consults the best interests of his *cestui que trust*, and avoids costs and trouble. The statute says, "on payment or

tender," &c., "to the purchaser or any one claiming under such purchaser," &c. Here the person having the beneficial interest is a married woman, who claims under the purchaser, Mrs. McMillan, not directly, but through a trustee, who holds the legal title from said purchaser. So far as the legal title is concerned, the trustee is in fact the person claiming from the purchaser; as, therefore, he is the only person who has power to convey when a tender is made, a tender to him is sufficient.

What would be the effect of a tender to the beneficiary in such a case, is a question not necessary now to be considered.

This bring us to the next question: Will a tender or offer to redeem, made while a judgment is in force, give a right to redeem after such judgment is reversed, if another judgment is recovered on the same cause of action, but after the expiration of the two years?

No creditor has a right to redeem, until he has reduced his demand to judgment; so that, although the statute says any "*bona fide* creditor" shall have the right to redeem, the courts have decided, for very strong and satisfactory reasons, that this can only mean a *bona fide* judgment creditor. Scales v. Thomason, 12 Ala. Rep., 309; Pollard v. Taylor, 13 Ala. Rep., 604.

But a judgment which is reversed, is, in contemplation of law, of no more force or virtue than if it had never existed, so far as respects the rights of the plaintiff in that judgment. It is regarded as a mere nullity. Dupuy v. Roebuck, 7 Ala., 484; Simmons v. Price, 18 Ala., 405; 21 Ala., 337. Every interest which depends upon it, belonging to the party in whose favor it was rendered, must share its fate and fall with it. If then, the judgment by a reversal becomes as if it never had been, the offer to redeem, which was dependent on it, is to be regarded in like manner as if it never had been made.

The terms prescribed by this statute must be strictly pursued, to entitle the creditor to redeem. 10 Smedes & M., 521; 7 Humph., 281; 5 Gilman, 171. The offer must be made by a *bona fide* judgment creditor within the term of two years from the date of the execution sale, or he will be barred. Here an offer was made within the time, upon a judgment which was afterwards reversed. That judgment thereby be-

came a nullity, and made the offer which grew out of it a nullity also. No other offer was ever made, as the record shows, but a new judgment on the same cause of action was recovered after the expiration of the two years. This offer, under the judgment which was reversed, could not survive the judgment out of which it grew, so as to give a right to redeem under this latter judgment; they cannot connect, as the one ceased to exist before the other had an existence.

That judgments upon which offers to redeem under the statute may be made should be liable to reversal for three years, and the right to redeem be limited to two, involves this right of redemption in some uncertainty; but if the foregoing principles are sound, it is not for the courts to apply the remedy.

Under the view we take of the last question discussed, the complainant was not entitled to redeem under the proof in the cause; and his bill, after the exhibition of the supplemental bill, should have been dismissed for want of equity.

Let the decree below be reversed, and a decree be rendered here dismissing the bill.

LAMAR *vs.* THE COMMISSIONERS' COURT OF MARSHALL COUNTY.

1. Any judgment or decree of any court, which shows upon its face a want of jurisdiction, either of the subject-matter or of the parties, is not merely voidable, but void.
2. The Commissioners' Court of Roads and Revenue in this State is a court of limited jurisdiction; and its proceedings, like those of all courts of limited jurisdiction, must show upon their face sufficient to support its jurisdiction, or its judgments are not merely voidable, but void.
3. The only case in which the Commissioners' Court has power to revoke a ferry license, is that given by the statute, (Clay's Digest, 513, § 26,) where the grantee fails to renew his bond, after receiving ten days' notice to do so; and the proceedings must show this notice, before the jurisdiction of the court begins. But it has no power to take a ferry from one who is in the enjoyment of it, and grant it to another, upon the petition of the latter showing a vested right in himself to the franchise.
4. *It seems*, that the petitioner's remedy, in such case, is, a proceeding in the na-

ture of a *quo warranto*, before the tribunal having jurisdiction of the subject-matter.

5. *Mandamus*, when directed to an inferior tribunal, is a writ which seeks to compel action; but it does not point out to that court how it shall act in a matter over which it has a discretionary power of decision. *Certiorari*, on the other hand, is a writ revisatory in its nature, and is issued for the purpose of enabling the superior court to correct the erroneous action of the inferior.

ERROR to the Circuit Court of Marshall.

Tried before the Hon. GEO. D. SHORTRIDGE.

James Lamar, the plaintiff in error, petitioned the Circuit Court for a *certiorari* to revise certain proceedings had before the Commissioners' Court of Marshall county, in the rejection of his petition seeking to be recognized as the owner and proprietor of the ferry at Gunter's Landing, and to be let in to the enjoyment of the franchise, on filing his bond, according to the statute in such case made and provided.

In his petition to the said Commissioners' Court, the petitioner sets out his claim, as being founded on a grant of the franchise to Edward Gunter, by the Commissioners' Court of Jackson county, within which county Gunter's Landing was then included. When Marshall county was established this landing fell within its borders. This grant to Edward Gunter was made on the third Monday in July, A. D. 1820. The petitioner alleges, that said Gunter went into the enjoyment of this franchise soon after the grant was made, renewed his bond from time to time before the said Commissioners' Court, and had the rates of ferriage established; that he continued in the enjoyment of said franchise until the year 1840, when he was restrained from the further enjoyment of it, by an injunction issued from the Court of Chancery, at the instance of Boggess & Randles, in a suit instituted in said Chancery Court, wherein said Boggess & Randles were complainants, and said Gunter and others were defendants. This suit was continued until some time in the year 1845, when it was voluntarily dismissed by the complainants. The petitioner propounds his title to the court, by which it appears that he is the owner in fee of the lands owned by said Gunter on the banks of the river at the ferry, claiming them by purchase from said Gunter.

The petitioner's application was resisted before the Com-

missioners' Court by James M. Gee, who was then in the occupation and enjoyment of the ferry franchise, and at his instance Lamar's petition was rejected. To revise this action of the Commissioners' Court, Lamar sued out the *certiorari* in this case, returnable to the Circuit Court; and in the record sent up to that court, the following facts appear:

That license to keep the said ferry was granted to Gunter, as alleged in the petition, and that his bond was renewed, and the rates of ferriage regulated, from time to time up to 1835–6; that in August, 1838, a license was granted to the said Boggess & Randles, to run a ferry boat from the south side of the Tennessee river at the same place, and they filed their bond according to the statute; that, on the first Monday in February, 1840, an order was made by said Commissioners' Court, revoking the license of said Gunter; but no reason is assigned for this action of the court, except that it is done on the petition of said Boggess & Randles, to whom the same order grants the exclusive privilege of keeping the ferry; and they then file a new bond. The record does not show that Gunter was notified of any proceedings against him, prior to the making of this order, or that he was required to do anything on pain of forfeiting his license.

The record further shows, that Gunter appeared before the court, the day after the last named order was made, and by his attorney moved the court to rescind said order, revoking his license; and that he tendered a bond, with good security, according to the statute, which he prayed the court to receive. This motion appears to have been made, and the bond tendered, on the third of February, 1840. The language of the court, in overruling the motion, is as follows: "This motion is overruled; first, on the ground that no bond has been given by Edward Gunter, or his agent, for keeping up said ferry; second, that no application has been made to the Court of Commissioners of Roads and Revenue, to grant to said Gunter a license to keep a public ferry at Gunter's Landing, according to the statute in such case made and provided."

It also appears, that, on the first Monday in February, 1845, James M. Gee applied to the said Commissioners' Court, for a license to keep a ferry at the same place; whereupon an order was made, revoking the license of Boggess & Randles,

and granting license to said Gee, who filed his bond, according to the statute; but no reasons are given for the revocation and grant.

It further appears, that, on the first Monday in May, 1846, Smith, Lamar and others filed a petition in said court, praying a license to keep said ferry, and founding their right on the original grant to Edward Gunter. Their petition shows to the court, that they are the owners of the land owned by said Gunter, to which this franchise is attached as appurtenant; and they claim to have acquired the franchise, by reason of their having acquired the land from Gunter. Boggess & Randles and said Gee appeared before the court, and contested this application, and the petition was rejected.

It further appears, that, on the first Monday in February, 1848, Lamar, the present plaintiff in error, filed another petition, in his own name, praying a license to keep said ferry, and showing that he is the sole owner of the land to which he claims the said license granted to Gunter has become appurtenant. Gee again appeared, and contested this application; and a trial was had between them, on the first Monday in May, 1848, of which the following entry appears in the record:

"James Lamar, v. James M. Gee. } In the matter of the petition of the plaintiff for renewing the bond as ferryman at Gunter's Landing, in his right by the purchase of Gunter's reservation: After hearing the evidence of the parties, and the attorneys on each side, and due consideration had thereon, it is ordered by the court, that said application be rejected." A bill of exceptions was taken on this trial, and by it the proof seems to have been voluminous.

On the nineteenth of August, 1850, the plaintiff in error filed another petition, alleging substantially the same facts as to his right to the franchise, and setting them out more fully and particularly. When this petition was filed, Gee again made himself a party, and contested Lamar's right to the ferry. A trial was again had between them; Lamar's petition was again dismissed, and he took a bill of exceptions, which sets out all the facts above stated.

The record contains a statement of many other facts, which are not deemed essential to a correct understanding of the

opinion of the court, and which are therefore omitted. The Circuit Court dismissed the *certiorari*, on the ground that it was not the proper remedy; intimating at the same time, that if the plaintiff had any rights, the proper mode in which to bring the case before that court was, a rule for a *mandamus*.

C. C. CLAY, Jr., for plaintiff in error.

BRICKELL & CABANISS, *contra*.

GIBBONS, J.—It is essential to the validity of all judgments or decrees, that they should be rendered by tribunals possessing the proper jurisdiction. The elements of this jurisdiction are two-fold: first, of the subject-matter adjudged; and secondly, of the parties whose rights are affected by such judgment or decree. The former of these the court acquires by the act of its creation, and possesses inherently by its constitution; the latter it acquires by its own acts, through the medium of its process and its officers. Any judgment or decree of any court, which shows upon its face a want of jurisdiction, either of the subject-matter or of the parties, is not merely voidable, but void.

Again; courts of limited jurisdiction must show, upon the face of their proceedings, sufficient to support their jurisdiction, or the same results will be visited upon their judgments or decrees. The Commissioners' Court of Roads and Revenue in the State of Alabama, is a court of limited jurisdiction. Its powers are confined to a small class of subjects; its boundaries are fixed and defined by the statute; and these it has no power to transcend. If it does so, its judgments are not merely voidable, but void.

Let us apply these principles to the action of this court, in the establishment of a ferry. It has the power expressly given to it to establish ferries, but the statute also defines how it shall act in such cases; and the court, in order to support its jurisdiction, must pursue the directions of the statute, or its acts will be nullities.

Again; this court has the power, in a given case, to revoke a ferry license; but in proceeding to exercise this power, its proceedings must show, upon their face, that the court acts upon the precise case made by the statute, and in the mode

provided by the statute, or its judgment will be of no avail. Applying this principle directly to the case at bar: The record shows, that the Commissioners' Court of Marshall county revoked the license of Gunter on a certain day. This court certainly had jurisdiction of the subject-matter, if the case made by the statute giving it this jurisdiction was before it; otherwise, it had no power to act in the premises. The proceedings of the court must show, upon their face, that it acted upon the case made by the statute. The only case given by the statute, in which this court has the power to revoke a ferry license, is that found in Clay's Digest, 513, § 26, where the licensee fails to renew his bond, after receiving ten days notice to do so. This notice is the very essence of the jurisdiction of the court; and without it, its judgment is absolutely void. The proceedings of the court must show this notice, before its jurisdiction begins. This view which we have taken disposes of the judgment or decree of the Commissioners' Court, revoking the license of Gunter. These proceedings, as shown by the record before us, do not show that Gunter was notified or required to renew his bond; and until this fact is made to appear, upon the face of the proceedings, the judgment must be held to be void. Garrett, Adm'r. v. Ricketts et al., 9 Ala. 529.

If the views which we have above expressed are correct, they also dispose of this entire case at this point. The record shows, that Lamar, the plaintiff in error, filed a petition in the Commissioners' Court of Marshall county, showing a vested right in himself to a franchise, and prayed that court to grant him the power to exercise that franchise, to which he was entitled, and of which another had deprived him. He might as well have gone into that court with a writ of ejectment, or of trespass to try titles. The court to which he addressed his petition, had no power to grant him the relief which he prayed, for the reason that it had not jurisdiction of the subject-matter. That court had the power to establish a ferry, and grant a license to a person to keep it, in a case made by the statute; but it had no power to take a ferry from one man, and give it to another. As above stated, it may revoke a license in the case provided by the statute, but in any other case it is utterly powerless to act.

The petition on its face shows the entire want of jurisdiction of the Commissioners' Court over the subject-matter, upon which it is called on to act. It is not the establishment of a ferry that is sought; but that one who is in the enjoyment of the franchise belonging to the petitioner should be ousted, and the petitioner be restored to his rights. He shows that he is the owner of the land to which this franchise became appurtenant while in the possession of Gunter; that the grant of the franchise to Gunter was a valid grant, and that it has never been legally revoked or annulled. He further sets out the manner in which he derives his title to the property, and seeks to stand in Gunter's shoes in respect to this right, which he claims to be appurtenant to the soil. This right is denied by Gee, the person in the enjoyment of the franchise; and the Commissioners' Court thereupon tries the issue between them. It may well be asked, where this court obtained the power to try an issue of this character. Certainly not from the statutes creating it, nor from any acts that we are aware of enlarging its jurisdiction.

We cannot distinguish the case made by the petition of the plaintiff, from that of any other proprietor of a franchise, who is interrupted in the enjoyment of his right by an intruder or a usurper. The usual remedy in such cases is, a proceeding in the nature of a *quo warranto*, before the tribunals having jurisdiction of the subject-matter. In that form of proceeding, the petitioner can obtain his rights, if he has any; but, as the case now stands before us, we can only say, that the whole proceedings, from the filing of the plaintiff's petition to the final judgment, are null and void.

The court below dismissed the *certiorari*, on the ground that the plaintiff had proceeded by *certiorari* to bring the case from the Commissioners' Court to the Circuit Court, instead of proceeding by *mandamus*. In this opinion the Circuit Court was doubtless in error; because, if the Commissioners' Court had passed judgment upon a matter within its jurisdiction, its proceedings could only be revised by *certiorari*. *Mandamus*, when directed to inferior tribunals, is a writ which seeks to compel action; but it does not point out, in a matter over which the inferior court has a discretionary power of decision, how that court shall act. *Certiorari*, on the other

hand, is a writ revisatory in its nature, and is issued for the purpose of enabling the superior court to correct the erroneous action of the inferior.

It follows from what we have said, that the Circuit Court decided correctly in dismissing the *certiorari*, but for a wrong reason; and its judgment is consequently affirmed.

MORRISON *vs.* TAYLOR.

1. To authorize the court to reject a declaration, on account of a variance between it and the endorsement on the writ, the variance must be total and amount to a radical departure.
2. A surety who is fully indemnified by his principal cannot recover contribution from his co-surety for money paid by him, but must indemnify himself out of the means placed in his hands.
3. Parol evidence is admissible to identify a demand secured by a deed of trust, in which it is described as consisting of one note, when in fact it consisted of two notes; and the deed itself is admissible notwithstanding the misdescription, to show that the debt was secured by it.

ERROR to the Circuit Court of Cherokee.

The record does not show the name of the presiding judge.

ASSUMPSIT by the defendant in error against John H. Morrison and Abraham Rowden, as to the latter of whom the suit was discontinued, process not having been served upon him. The suit was commenced in the County Court, and removed by writ of error to the Circuit Court.

The plaintiff sues to recover contribution, for money paid by him on two notes, for forty-five dollars each, payable to the administrators of Randolph Allsap, which had been reduced to judgment, and on which Morrison, Rowden and others were co-sureties with him. The declaration contains several counts; some of these deduce the defendant's liability to pay by reason of his being co-surety with the plaintiff, who has been obliged to pay the whole debt; others predicate his liability upon his promise to indemnify and refund to the plaintiff whatever sum he might pay by reason of his becoming bound on the note, and in consideration of his signing it;

and to these are added the common *indebitatus* counts. There was a demurrer to the whole declaration and to each count separately; but the record does not show what disposition was made of it.

A trial was had in the County Court, which resulted in a verdict and judgment for the plaintiff; but the defendant took a bill of exceptions to several rulings of the court, and carried the case to the Circuit Court by writ of error. There the judgment of the County Court was affirmed, and the case is now brought here by writ of error.

The other facts of the case, and the errors assigned, will be readily understood from the opinion.

WHITE & PARSONS, for plaintiff in error:

1. The court erred, in excluding the evidence offered by plaintiff in error. Duffie v. Pennington, 1 Ala. 506.

2. The court should have non-suited the plaintiff below, on the facts which were offered in support of the motion. Clay's Digest, 325 § 75; Carter v. Dade, 1 Stewart 18.

J. B. MARTIN, *contra:*

1. The declaration substantially conforms to the cause of action endorsed on the writ. Tenison v. Martin, 13 Ala. 21; Ainsworth v. Partillo, ib. 460.

2. This court will not revise the action of the court below, in refusing to non-suit the plaintiff on the ground that he had not recovered fifty dollars. 13 Ala. 460.

3. The deed of trust was properly rejected. It recites, that the grantor was desirous to secure the payment of a certain note, made payable to the estate of R. Allsap, deceased, for ninety dollars. The parol proof was, that the deed was made to indemnify Taylor, as the security of the grantor on two notes for forty-five dollars each, on which Taylor, Morrison, Rowden and Wm. Miller were securities. This evidence contradicts the deed, and adds materially to its terms. West & West v. Kelly's Executors, 19 Ala. 353; Phil. Ev., C. & H.'s Notes, 1467, 1468; 1 Ala. 456; ib. 160; 5 Porter 88; 2 Ala. 280.

CHILTON, C. J.—We will notice the assignments of error in their order:

1. The first is, that the court erred in refusing to strike out the third and fourth counts of the declaration, for a supposed variance. These were the common counts. It has been several times ruled by this court, that a variance between the cause of action endorsed on the writ and the declaration must be total, and amount to a radical departure, to authorize the court to reject the declaration. Tenison v. Martin, 13 Ala. 21, and cases there cited. There is no such departure in the counts before us, and the motion to strike out was properly disallowed. 13 Ala. 460.

2. As conducing to prove that the plaintiff was fully indemnified against his liability for Smith, who was the principal in the two forty-five dollar notes, on which said plaintiff became bound as security, the defendant offered to introduce in evidence a copy of a trust deed, the original having been shown to be lost, made by Smith, the principal in the note, to the plaintiff "to secure the payment of a certain note made payable to the estate of Randolph Allsap, deceased, for the sum of ninety dollars," &c. This deed the court decided was irrelevant, on the ground that there was a variance between the demand described in it and the two notes which had been paid by the plaintiff. The defendant then offered to connect the deed with proof, to show that the ninety dollar demand secured in the deed was the same shown by the two forty-five dollar notes; but the court rejected this explanatory proof.

The question, as applicable to the proof offered, was, whether the plaintiff below had been fully indemnified by the principal in the matter of his liability as security. If he was so indemnified, he had no right to invoke the equitable doctrine of contribution, for his claim to contribution being founded upon an equity to call upon another to share with him a common burthen, he must be entitled *ex æquo et bono* to recover, or he must fail.

Now, if the demand for which Taylor, the plaintiff below, was liable, was secured and fully provided for by this deed, it is very clear he could not recover contribution out of his co-sureties, but must indemnify himself out of the means placed in his hands. Bezzell v. White, 13 Ala. 422. Nor do we think it at all material that, in describing the indebtedness in the deed, which does not purport to give a particular de-

scription of it, it is set out as due upon one instead of two notes. The amount secured is the same, and it is described as due from Smith to the estate of Randolph Allsap, deceased. It was perfectly competent to identify the demand by parol proof. In Posey et al. v. The Branch Bank at Decatur, 12 Ala. 802, it was decided by this court, that parol evidence is admissible to show that a particular bill of exchange was intended to be secured by a deed of trust, although generally or improperly described in the deed. See, also, Duval's Heirs v. McLoskey, 1 Ala. 708. This authority is decisive of the case before us, and shows that the County Court committed an error in excluding the parol proof in connection with the deed.

Let the judgment of the Circuit Court, affirming the judgment of the County Court, be reversed, and the cause remanded.

SMITH *vs.* ANDERS.

1. A plea of tender is fatally defective on demurrer, when it shows on its face that the sum tendered was less than the amount due.
2. When a tender is made after suit brought, it must be of the sum due, with interest thereon, and costs of suit; and this must be averred in the plea.
3. When land is sold under mortgage or deed of trust, the mortgagor's right to redeem within two years, under the statute, is a mere equitable right, which can only be enforced against an unwilling purchaser in a court of equity; the mere tender of the amount required by law does not re-invest him with the legal title.

ERROR to the Circuit Court of Tuskaloosa.

Tried before the Hon. THOMAS A. WALKER.

TRESPASS TO TRY TITLES to certain lands described in the declaration by Ezekiel Anders v. James P. Smith. The writ appears to have been issued on the 17th of May, 1850.

The declaration is in the usual form. The defendant pleaded, first, not guilty; and secondly, as follows: "And for further plea the defendant saith, the plaintiff ought not further to maintain his suit; because, he says, that the said lands, in

the plaintiff's declaration mentioned, were sold under and by virtue of a deed of trust, executed by this defendant, on the 29th day of October, 1849, to secure to one John Kirby, administrator of James Hudson, deceased, the payment of a certain sum of money therein mentioned, and purchased by the plaintiff on the day of , for the sum of $100; and that afterwards, to-wit: on the 25th day of October, 1850, the said defendant tendered to, and offered to pay said plaintiff, the said sum of $100, the purchase money of said lands, together with ten per cent. thereon, pursuant to the statute in such cases made and provided, and demanded a re-conveyance of said land; which money the said plaintiff then and there refused to receive, and to re-convey said lands; which said sum of money, to-wit: the sum of $105, the said defendant now brings into court; all which he is ready to verify," &c.

The plaintiff demurred to this plea, and his demurrer was sustained by the court. The judgment of the court on the demurrer is now assigned for error.

ORMOND & NICOLSON, for plaintiff in error.

P. & J. L. MARTIN, *contra.*

LIGON, J.—As a plea of tender, the one found in this record is bad for several reasons. First, because, on its face it shows that the sum tendered is less than the plaintiff below had a right to demand, and the defendant was bound to pay, before he was, under our statute, entitled to require a re-conveyance of the lands. It appears by the plea, that the lands were bid off by the defendant in error at the sum of $100, and the amount tendered was only $105, when the statute requires that the purchase money, with ten per cent., shall be tendered, before the purchaser is bound to re-convey to the grantor in the deed of trust. Clay's Dig. 503 § 5. It is familiar law, that a tender of less than the sum due is not sufficient. Baker v. Gasque, 3 Strobh. 25.

The record also shows, that the tender was made during the pendency of this suit. In such cases, where this plea has been allowed at all, the courts have invariably decided, that the tender must not only be of the sum due, with interest, but the costs of the suit must be superadded, and this must

be averred in the plea. Retan v. Drew, 19 Wend. 304; Burt v. Dodge, 13 Ohio 131.

There is, however, another objection to this plea which is insuperable. The title which it attempts to set up is not cognizable in a court of law. That court deals only with legal titles; and this, at most, is but an equity.

The mere tender of the amount required by law to be paid by the mortgagor to the purchaser of the mortgaged premises does not, *per se*, re-invest the former with the legal title to the lands. Such titles must be evidenced by deed properly executed, or some other writing sufficient to pass them. This seems to have been contemplated by the framers of the law under which the plaintiff in error sets up his claim; for it provides, that when the sum required by its provisions to be tendered to the purchaser is offered to him, it shall be his duty to re-convey the lands to the debtor or mortgagor, but at the cost and charge of said debtor or mortgagor. Clay's Digest 502, 503 § 1–5. Until this re-conveyance is executed, the legal title is in the purchaser, and the former owner has an equitable right to redeem within two years from the date of the sale; and this he can only enforce in a court of equity, which has full power to compel an unwilling purchaser to re-convey to him.

Such has thus far been the practice in this State,—Scales v. Thomason, 12 Ala. 309; Pollard v. Taylor, 13 Ala. 604; and such is the practice in the States of Kentucky, Mississippi, Indiana and Tennessee, in all of which laws very similar to our own exist. See Adams v. Kable, 6 B. Monroe 384; Watson v. Hannum, 10 S. & M. 521; Thornhill v. Gilmer, 4 S. & M. 153; Raub v. Heath, 8 Blackf. 575; Hepburn v. Kerr, 9 Humph. 726; Ransum v. Pillow, ib. 271. To these, scores of other cases might be added from these States, and the State of New York, in all which the right to redeem, under such statutes as we are now considering, is treated and enforced as an equity of redemption. And such, in our opinion, is the right of the plaintiff in error, and consequently it cannot be set up as a defence to this action.

There is no error in the record, and the judgment is consequently affirmed.

MURDOCK *vs.* CARUTHERS.

1. A promise in writing by one firm to pay a specified sum on a day certain to the order of another firm which has a common partner, is not a promissory note until assignment; but when assigned by the latter firm, the assignee must be regarded, as between himself and the makers, as the real payee, and may maintain an action in his own name against the makers. (Goldthwaite, J., expressing no opinion.)
2. The statute of 1828 (Clay's Digest, 383, § 12,) was not intended to confine and limit the right of the assignee to sue, to those cases only in which the payee could have maintained his action, but to confer upon the assignee the additional right of suing the maker in any form of action which the payee could legally resort to, "whether debt, covenant or *assumpsit*." (*Per tot. cur.*)

ERROR to the Circuit Court of Franklin.

Tried before the Hon. THOMAS A. WALKER.

ASSUMPSIT by the defendant in error against the plaintiff, on two written instruments, in the form of promissory notes, executed by the firm of J. Murdock & Co., payable to the firm of Armour & Lake, and by the latter firm assigned by endorsement to Caruthers. Murdock, the plaintiff in error, was a partner in each one of said firms.

WILLIAM COOPER, for plaintiff in error:

The notes sued on are not negotiable by *lex mercatoria* or common law, nor do they come under the provisions of the statutes of this State. Clay's Digest, 383, §§ 11, 12. No action could be maintained by the payees at common law, because they were members of the firm of J. Murdock & Co., the makers; and the assignees of notes not negotiable, can maintain no action that the payee could not maintain. An action at law cannot be maintained on a bill single, payable to a firm of which one of the obligors is a partner. Minor's R. 103. One partner cannot sue his co-partner at law, even after a dissolution, unless there has been a settlement of the partnership, and a balance struck. Philips v. Lockhart, 1 Ala. 521; Banks v. Mitchell, 8 Yerger, 111; Tipton v. Nance, 4 Ala. 194. In the last cited case, it is said, that this disability to sue is not a mere technical disability, but results

from the very nature of the partnership. The partner, then, not having this right of action, could not give it to his assignee.

The cases in which the Supreme Court of this State has determined that the assignee of a note payable to a firm of which the maker is a partner may maintain an action, are such notes as are negotiable, and governed by the law merchant, and embraced by the statute. (Digest, 383, § 11.) Such notes are expressly exempt from the influence of the statute regulating the assignment of bonds, notes and other instruments payable in bank. Smyth v. Strader, Perrine & Co., 9 Porter, 448.

The case of Lacy v. LeBruce & Prince, 6 Ala. 904, is not applicable to this case. There the common partner died; and the court held, that his death removed the impediment to a suit at law, and that the survivors of one firm might sue the survivors of the other. That case was decided on common law principles, according to which, on the death of one partner, the legal title to all choses in action belonging to the firm passes to the survivor; and having the legal title, he would have the right to sue at law, without the aid of the statute authorizing the transfer of notes, &c. Murray v. Mumford, 6 Cowen, 441; Egbert v. Woods, 3 Paige, 526; 18 Ala. 68.

Not so, in the case at bar. The assignee has no other right, than that derived from the statute of 1828, which gives him the right to "maintain such action as the obligee or payee could have done, whether it be debt, covenant or *assumpsit*." If the payee could not maintain the action at law, neither can the assignee under the statute, the notes not being negotiable, either by the *lex mercatoria* or the statute. At common law, a promissory note was not transferrable. Byles on Bills, 4: Chitty on Bills, 517; 2 Black. Com. 468; 4 Term R. 148.

Suppose J. Murdock & Co. have offsets against Armour & Lake. Will the court of law undertake to adjust these offsets? If it does, it necessarily undertakes the settlement of the accounts of both firms. But if the right of action attaches on the endorsement, then too will the statute carry the right of offset. This objection is unanswerable, and such seems to have been the opinion of the court in Tipton v. Nance, 4 Ala. 197.

JOHN A. NOOE, *contra:*

It is admitted, that Armour & Lake could not have enforced the collection of this note, by an action at law against J. Murdock & Co.; but it does not follow, as a necessary consequence of their inability to sue, that their assignee could not. By the assignment, the legal right in the note became vested in Caruthers; and having the legal title, there was no impediment to his enforcing his rights in a court of law. This position is sustained by the following cases: Lacy v. LeBruce & Prince, 6 Ala. 904; Smith v. Lusher, 5 Cowen, 688; Pitcher v. Burrows, 17 Pick. 361; Smyth v. Strader, 9 Porter, 446.

The statute of 1828 was clearly intended to afford to the assignee a legal remedy, to enforce in his own name a legal right; and that his remedy should not be affected by any technical impediment in the remedy of his assignor. The meaning of the statute is, that by a written assignment of a note the legal title is vested in the assignee, and he may maintain in his own name any action that he could have maintained if he had been the payee. He may then maintain a suit upon a note, when there is a technical impediment which prevents the payee from doing so. Independently of this statute, the assignee in this case had a right of action in his own name, and the statute certainly was not intended to abridge his rights. Our Supreme Court has decided, that the statute of Anne is merely declaratory of the common law, or *lex mercatoria;* and by that law, after assignment, promissory notes may be declared on as bills of exchange. Chitty on Bills, 155; 2 Stew. & P. 428; 4 Porter, 441; 1 Ala. 295. Now, the statute of Anne places promissory notes on the same footing with bills of exchange, as to negotiability according to the custom of merchants. Then, before the passage of that statute, an assignee of a note could sue in his own name by *lex mercatoria*, and the statute was only declaratory of that law.

GOLDTHWAITE, J.—The following are the facts of the case, as they are shown by the record: William Armour and Henry Lake were a mercantile firm, under the name of Armour & Lake. The same persons, with James Murdock,

composed another firm, doing business by the style of J. Murdock & Co. The firm of J. Murdock & Co. made a promise in writing, to pay to the order of the other firm, Armour & Lake, on a day certain, a specified sum, for value received. This writing was assigned by Armour & Lake to the defendant in error, who brought suit upon the same against said Murdock, the plaintiff in error, averring these facts in his declaration. The legal question in this court is, as to his right to recover upon this state of facts.

The plaintiff in error urges against the right to maintain the action, that the instrument sued upon, being a promissory note, was not assignable at the common law; that it was made assignable only by the statute of this State, (Clay's Digest, 381 § 6, 383 § 12;) and that this statute, while it confers upon the assignee the right to sue in his own name, confines the exercise of this right to those cases only in which the payees might have maintained an action; and that, as in the present case no action at law could have been maintained by Armour & Lake, so the defendant in error, who claims as their assignee, and derives his only right to sue under the statutes referred to, cannot sustain his action.

Waiving the discussion of the question as to the assignability of promissory notes at the common law, and conceding for the present that the terms of the statute are such as require us to recognize the construction contended for; still, we do not think it necessarily follows that the law upon the facts as presented is with the plaintiff in error. Unquestionably, under that construction, if it is admitted that the instrument sued on was a promissory note before its endorsement by Armour & Lake, the consequences insisted on by the counsel for the plaintiff in error must ensue. Armour & Lake would then be the payees; and as they could not maintain an action upon it, their assignees could not. But was this instrument, legally speaking, a promissory note, before its endorsement by the parties to whom it was payable? A promise in writing made by A, to pay a specified sum of money to his own order, is not a note, until endorsed by him; for the reason, that, until then, no legal obligation is created. So also, in relation to a note payable in bank, drawn by a firm payable to one of its members, and by him assigned, it

has been held by this court, that the assignee could maintain an action against the makers in his own name. Smyth v. Strader, 9 Porter, 446; and see also Smith v. Lusher, 5 Cowen's R. 688, and Pitcher v. Burrow, 17 Pick. 361. It is true, that the cases cited rest the decisions mainly upon the law merchant; but the principle on which they are based must be, that, as legal obligations, they were incomplete, until endorsed; until then, they would simply be evidence of a debt from the makers to the parties to whom they were payable; but when endorsed, they became promissory notes, the endorsee being, as between himself and the maker, the actual payee.

This being the principle applicable to mercantile paper, the reason of the rule must equally apply to all promissory notes. The case of Lacy v. LeBruce, 6 Ala. 904, is directly in point, upon the principle involved. That was a note not mercantile in its character, made by one firm payable to another, each firm containing a common partner. This partner died; the surviving payees brought their action; and it was held, that they could recover. The decision was based upon the ground, that the death of the common partner operated as an assignment to the surviving payees; thus recognizing the principle, that, if the payees had assigned the note, the assignee could have maintained the action. The authorities referred to, and the reason on which they are based, lead us to the conclusion, that the writing sued on, until assigned by Armour & Lake, had no validity as a note, and that after the assignment the assignee, as between himself and the maker, must be regarded as the real payee, and sustaining in the present case this relation, he is not affected by the statute.

These views are entertained by the other members of the court, and in relation to their correctness I express no opinion, preferring myself to rest the decision upon the construction of the acts of 1812 and 1828, (Clay's Digest, 381 § 6, 383 § 12,) authorizing the assignment of promissory notes; in which we all concur. The first of these acts declared promissory notes, &c., assignable; and the act of 1828, after providing that bills of exchange and notes payable in bank should be governed by the law merchant, &c., proceeds thus: "All other contracts for the payment of money," &c., "shall be

assignable as heretofore, and the assignee *may maintain such suit thereon as the obligee or payee could have done, whether it be debt, covenant or assumpsit.*" These acts were not restraining acts; they were not intended to diminish the rights of the holder against the maker, but rather to enlarge them. The object was, to make every description of promissory notes assignable, protecting the rights of the maker by allowing him to assert any legal defence which he had before receiving notice of the transfer; and the words which we have italicized were not intended to confine and limit the right of the assignee to sue, to those cases only in which the payee could have maintained his action, but to confer upon the assignee the additional right of suing the maker in any form of action which the payee could legally resort to; "whether debt, covenant or *assumpsit.*" Thus the payee could bring debt against the maker; but it was for some time a question, whether the endorsee or assignee could bring that action against the maker of a note, there being no privity of contract between them, (Chitty on Bills, 690;) and the statute, in securing to the assignee the same form of remedy that the payee had, was intended to remove this doubt.

In regard to the difficulty suggested by the counsel for the plaintiff in error, upon this construction of the statute, in relation to sets-off existing between the maker and payee, we do not well understand how any question of that kind can arise, upon assignments like the one under consideration. Its validity is not denied: that can only be done by a sworn plea, (Clay's Digest, 341, § 158;) and in all cases in which the transfer was made by payees who were also members of the firm that made the note, we think the assignment being made by one partner would not operate as a waiver of any set-off on the part of the firm to which he belonged. But even if this is not the law, the right of set-off by the makers would not be affected, although they might be required to assert it before another tribunal. The statute could not have contemplated equitable sets-off; and as between two firms having common partners there could be no other. We may add, the same difficulty in relation to sets-off is presented in the case of Lacy v. LeBruce, *supra*, and is necessarily covered by that decision.

The judgment is affirmed.

CRUISE *vs.* RIDDLE.

1. The proviso to the act of Congress of February 11, 1847, conferring bounty lands on soldiers, was intended to protect not only pre-emption claimants, but also those who had actually settled and cultivated the public lands, although they might not under the law be entitled to a pre-emption.
2. But if this proviso of the act is disregaded, and the bounty land claimant obtains from the register a certificate to land which is actually settled and cultivated by another, the settler cannot defeat the title of the claimant in an action of ejectment.
3. *It seems*, that the settler's remedy is by application to the Government, to recall the certificate, or refuse the patent if it shall appear that it was wrongfully obtained.
4. In ejectment, the usual notice and declaration are sufficient to bring the defendant into court.

ERROR to the Circuit Court of Talladega.

Tried before Hon. ROBERT DOUGHERTY.

EJECTMENT by Walter D. Riddle against Samuel S. Cruise.

Before entering into the consent rule and pleading, the defendant moved to strike the cause from the docket, and to quash and set aside the declaration and notice served upon him, on the ground that no process or writ had been issued or served upon him, other than the said declaration and notice, which he contended were not sufficient in law to bring him into court, or to put him to his defence on the merits. But the court decided, that said declaration and notice were sufficient, and required him to enter into the usual consent rule and plead; to which defendant excepted.

On the trial, the plaintiff exhibited a certificate from the register of the land office at Lebanon, dated December, 1848, showing that a bounty land warrant had been located by said Riddle on the land in controversy. The land was shown to have been public or Government land at the time, lying in Talladega county. He also introduced proof tending to show, that defendant was put in possession of said land in 1846, and held under him as his tenant before he obtained the said register's certificate.

The defendant introduced evidence tending to show, that he held said land claiming it as his own, and that he had

cleared and cultivated a portion of the forty acres, at and before the time when the said register's certificate was issued to Riddle.

The court charged the jury: "That, if, in 1846, the agent of the plaintiff put the defendant in possession of said land, and if the said certificate was issued on the day of its date, then, the said certificate was sufficient to entitle the plaintiff, and did entitle him, to recover said land from the defendant in this action;" to which charge the defendant excepted.

The defendant then asked the court to charge: "That, if, at the time said certificate was issued, and for one year before its issuance, the defendant and his family resided on said land, and cultivated the portion of it which was cleared, and fenced a portion of said land, and built a stable and corn crib on it, before said certificate was issued, then, the said certificate was not sufficient to entitle the plaintiff to recover said land from the defendant in this action;" which charge the court refused to give, and the defendant excepted to the refusal.

The errors assigned are:

1. The several decisions and rulings excepted to by plaintiff in error, as shown by the bill of exceptions;

2. The court below erred, as shown in the bill of exceptions.

RICE & MORGAN, for plaintiff in error:

1. A defendant in ejectment may invoke an outstanding title in a third person, to protect his possession. This right is independent of any claim or color of title. If he has the possession, his right to the land is complete until the plaintiff shows a better title; and he may show that the plaintiff's title is bad, or that a third person is the true owner. The law will not disturb the possession, to let in one claiming under a bad title. King v. Stevens, 18 Ala. 477.

2. An occupant of public land is not a mere trespasser. The Government has invited actual settlements on the public lands, and, in the pre-emption laws, has secured valuable privileges to actual settlers. An occupant of public land becomes a trespasser, only when, in cases of actual settlement, the Government disposes of the land to a purchaser, by valid sale according to law. It is against the whole policy of the

law in this country to treat every occupant of public domain as a trespasser.

3. No officer of the United States Government can pass the title of the Government, in lands embraced in the proviso of the act of 11th February, 1847, § 9, to a person claiming to locate a land warrant on such land. Such a grant is void, because it is directly in violation of law. Sessions v. Reynolds, 7 Miss. 157; Stoddard v. Chambers, 2 Howard U. S. Rep. 317–18; 1 Murph. N. C. 162.

4. The act of Congress of 11th February, 1847, puts the actual settler on public lands in a better position, as to the bounty land claimants, than they had occupied towards other persons claiming to hold under Government grants. The act cited protects settlers against such claimants; and, as against them, gives to settlers the better right to the possession. Can the officers of the Government destroy this right at pleasure, and, by the issuance of a certificate or patent for such lands, confer the title in violation of law, and cut off inquiry into the validity of their acts? Such would be the necessary effect of a decision which would hold, that a patent could not be attacked by a settler, simply because he had no title to the land. The settler is without remedy, if his rights are thus violated. He has no notice of the action of the Government officers, until he is sued for the possession; and then he cannot defend, because the certificate has issued.

5. There was no tenancy shown between the parties, nor was it shown who had built the house upon the land. The facts did not make out the relation of landlord and tenant; and the charge given assumes the tenancy as resulting from the simple fact, that Cruise was put in possession of the house by the agent of Riddle.

6. The charge refused had no reference to any tenancy, but makes the case turn upon the fact, that the certificate issued, as shown by the facts stated in the charge refused, would not authorize the plaintiff to recover. This was a clear proposition of law, and should have been stated to the jury.

PARSONS & WHITE, *contra:*

1. The plaintiff in error does not show that he is in possession under color of title; in fact, the record shows he is a

mere intruder, and therefore cannot insist on the invalidity of Riddle's title. Crommelin v. Minter, 9 Ala. 594, and cases cited in opinion.

The same rule governs in regard to personal property, so that a mere trespasser or volunteer cannot show that plaintiff's title was obtained by fraud. Dunklin v. Wilkins, 5 Ala. 199.

Cruise went into possession under Riddle, and that is, of itself, sufficient to authorize Riddle to recover. Crommelin v. Minter, 9 Ala. 607.

PHELAN, J.—The act of Congress of 11th of February, 1847, (P. Acts, p. 15) conferring bounty lands on soldiers, after declaring that warrants may be located on any lands of the United States subject to private entry, contains this proviso: "*Provided*, that no land warrant issued under the provisions of this act, shall be laid on any lands of the United States to which there shall be a pre-emption right, or upon which there shall be an actual settlement and cultivation."

The act of Congress of 4th September, 1841, (U. S. Statutes, vol. 5, p. 455,) the last general law on the subject of pre-emptions previous to the act of 1847 aforesaid, requires, that a person seeking to obtain a pre-emption should be a citizen of the United States, or one who had declared his intention under the naturalization laws, and who actually lived on and cultivated the land. It required further, that he should not have obtained a pre-emption previously; that he should not be the owner of 320 acres of land in the United States; and that he should not have abandoned his own land to get a pre-emption. He was required to state these several matters under oath, and also, that he had made the settlement *bona fide* for his own exclusive use and benefit, and not, directly or indirectly, for the benefit of another, under an agreement to sell, or otherwise. And, by the 15th section of the same act, the settler, and the person intending to settle and improve public land, was required to file with the register a statement of such intention, and pay out the land in twelve months from the filing of such statement, or the land was made subject to entry after that time.

It would hence appear, that there are several classes of persons who may be actual settlers on the public lands and cul-

tivate the same, who are not entitled to the right of pre-emption, and who would consequently be liable to lose their improvements by an entry under a regular purchase from the Government. But, does it follow, that these persons are also liable to lose their settlements by an entry under a bounty land warrant issued under the act of 1847?

The words of the act of 11th February, 1847, conferring bounty land certificates or warrants, expressly restricts them, as we have seen, from being laid on any land subject to a "pre-emption right, or upon which there shall be an actual settlement and cultivation." A plain distinction is made, and it is manifest the statute was intended to go beyond pre-emption claimants merely, and to embrace also those who actually settled and cultivated the land, although they might not, under the law, be entitled to a pre-emption. It was the intention of the law-making power evidently, to regard all such as objects of bounty and good will, as well as the soldier in the service, and to say, that the soldier with his bounty land warrant should not oust any actual settler who lived on a piece of public land, even if he were a person not entitled to a pre-emption. This law, taking its complexion from the spirit of the age and country, regards the actual settler on wild lands less in the light of a trespasser than formerly; and there seems to me to be reason for it.

But admitting that the act of Congress forbids a bounty land warrant to be laid on such a settler, what remedy is provided if this injunction of the statute be disregarded? Can the settler defend against the bounty land claimant holding a certificate of the register of the land office, or a patent? This will depend upon the nature of the interest conferred upon him by the statute in the land he cultivates. The certificate of the register is a title under which the bounty land claimant must recover in an action of ejectment, unless the settler can show better title in himself or some one else. He has no title himself. It cannot be pretended for a moment, that the act of Congress invests him with any interest in the land, or with anything more than a license to cultivate and occupy it. It may admit of controversy, if it even goes that far. This license, then, conceding it to be such, the Government of the United States may withdraw or revoke at any time; and the grant of

a certificate or patent for the land to another, by the official agents of the Government, is of itself a revocation of the license to the settler. The settler, then, has no title in himself, and the title of the Government, whose tenant at sufferance he was, is in the bounty land claimant; and consequently, in an action of ejectment, this title must prevail.

Has the settler, then, a privilege or favor granted him by the law of the land, that any bounty land claimant may take away in defiance of the statute? There is a remedy every way equal in dignity to the right. The right is only a license, and the remedy is, by application to Government to recall the certificate, or refuse the patent, if it shall appear that it was wrongfully obtained. But that must rest with the Government and the department having charge of public lands, to whom the application must be made.

From the view taken of the nature of Cruise's occupancy, it is needless to consider the question, whether he entered upon this land by contract with Riddle, and was holding under him when he cleared and built houses, or not. The certificate of the register of the land office gave Riddle a title, upon which he was authorized to recover under either aspect of the case; so that there was no error, either in the charge the court gave, or in refusing the charge it was requested by defendant to give.

Before proceeding to enter into the consent rule, the defendant moved to quash and set aside the declaration and notice served upon him, which the court refused. The argument offered here in support of this motion is, that the statute (Clay's Digest 334, §123) requires, "that all original process, and all subsequent process thereupon, to bring any person or persons to answer any action," &c., shall be issued by the clerk of the court; and declares, "that all writs or process issued in any other manner may be abated on the plea of the defendant." This statute was passed in 1807. In 1835 the statute was passed authorizing the "action of ejectment," which had been previously abolished. This statute authorized the "action of ejectment," and of course the mode of proceeding in that action according to the course of the common law. Any other construction would make the latter statute nugatory and unavailing. It authorizes a notice from the plaintiff to bring the

defendant into court by necessary implication, just as fully as the express authority given by statute to bring a sheriff into court by notice, to answer for a default, authorizes that proceeding. The statute of 1807 does not affect either.

There is no error in the record, and the judgment below is affirmed.

WALKER *vs.* CLAY AND CLAY.

1. When a note is given, payable at a particular future day, upon the consideration that the payee agreed to perform certain services for the maker, and no time is fixed for the performance of the services, the maker cannot defeat a recovery, on the ground that the payee has not yet rendered the entire services contemplated by the agreement, when the payee is in no default, but able, ready and willing to comply with the contract on his part.
2. Where a note is given, payable "six months after date," "for value received," in consideration of the payees' agreement to perform certain services as attorneys at law for the maker, and no time is fixed for the performance of the services, parol evidence is inadmissible to show that the note was not to become payable until the contemplated services were rendered.
3. Although the law will sometimes rescind a contract in favor of one party, on account of the default or misconduct of the other, yet when he who seeks a rescission can allege no default or misconduct against the other party, he cannot at his election annul it.
4. When *non est factum* is pleaded to a declaration on a promissory note, and the defendant has introduced evidence tending to show that he was insane, "at, before and after the time of the execution of the note" by him, the plaintiff may rebut this evidence by proof of the defendant's condition *seventeen* days after its execution.
5. The appointment by the court of a guardian *ad litem* for a lunatic defendant, is not error, when the record shows that the defendant appeared and pleaded "by his guardian *ad litem* and by attorney;" especially, when the record indicates that the guardian was appointed at the instance of the defendant's attorney.
6. In a suit against a lunatic, the judgment is properly rendered against the lunatic himself, and not against his guardian.

ERROR to the Circuit Court of Jackson.
Tried before the Hon. THOMAS A. WALKER.

This was an action of DEBT by the defendants in error against the plaintiff, on a promissory note of which the following is a copy, viz:

"Six months after date, I promise to pay C. C. Clay & C. C. Clay, Jr., four hundred dollars, for value received of them, this 29th September, 1848."

(signed) GEORGE WALKER.

"Test. J. M. McDuff."

After the cause was regularly in court, a suggestion appears to have been made to the court, that the defendant had become a lunatic, and a motion was made to have a guardian *ad litem* appointed, to conduct the defence of the suit. The court entertained the motion, and on proof being made to the court that Daniel M. Martin was his regular guardian, acting under the appointment of the Chancellor, the said Martin was appointed his guardian *ad litem*, and thenceforward appeared by attorney, as did the defendant, and defended the said suit.

The defendant pleaded, first, *nil debet*, on which issue was joined; secondly, a total failure of consideration, alleging that the note was given for certain services to be performed by the plaintiffs, as attorneys at law and solicitors in chancery, in and about a certain chancery suit then pending in the Chancery Court of Jackson, and a certain indictment for murder then pending against said Walker in the Circuit Court of said county, and that said services had not been performed. To this plea there was a replication, denying that the consideration of said note was, in any part, an agreement by plaintiffs to render services in a chancery suit, but confessing that it was the defence of said Walker under the said indictment pending against him for murder; and averring a partial performance of the services agreed to be rendered by them, and a readiness to perform entirely what they had agreed to do, whenever said Walker should be tried. The defendant demurred to this replication, but the demurrer was overruled. He then rejoined, in effect, that, at the next term of the Circuit Court after the execution of said note, said Walker was insane and a lunatic, and had so continued up to the time of pleading, and was incapable of being tried, in consequence thereof. To this rejoinder the plaintiffs demurred, and their demurrer was sustained.

The defendant pleaded, thirdly, a partial failure of consideration, averring nearly the same facts as in the second plea, and alleging that said plaintiffs had not performed any servi-

ces in the said chancery suit. On this plea issue was joined.

The defendant pleaded, fourthly, *non est factum*, alleging said Walker's lunacy at the time of the execution of the note. On this plea issue was also joined.

The defendant pleaded, fifthly, that the consideration of the note was, the plaintiffs' undertaking to defend said Walker on the trial of said indictment then pending against him, and that it was the understanding and expectation of the parties, at the time said note was executed, that said Walker would be tried at the then next term of said Circuit Court; and for this reason said note was made payable at six months, in order that it might become due and payable when the said services should have been entirely performed; and averring, that before the said next term of said Circuit Court, said Walker had become insane, and was so pronounced by the proper authorities on a commission of lunacy, and that he was still insane up to the time of pleading, and had not, for that reason, been brought to trial, and the plaintiffs had not yet defended him according to their agreement. The plaintiffs demurred to this plea, and their demurrer was sustained.

The defendant pleaded, sixthly, the same facts as to the consideration of the note, the lunacy of Walker, and his inability in consequence thereof to be tried under the said indictment, with these additional averments: That defendant had offered to pay said plaintiffs a reasonable compensation for the services which they had rendered in and about said prosecution, and claimed from them a rescission of the contract under which said note was given; that plaintiffs refused to rescind the contract; that he had offered said plaintiffs the sum of fifty dollars, which was a reasonable compensation for the services rendered by them, and claimed a rescission of the contract, as above stated. To this plea there was a demurrer, which was sustained by the court.

On the trial below a bill of exceptions was signed by the presiding judge, at the instance of the defendant, from which it appears, that said defendant "offered proof tending to show that said Walker was insane, at, after and before the time of the execution of said note. Plaintiffs, to rebut this testimony, introduced one Austin, who stated, that he had seen and conversed with said Walker, almost daily, for sev-

eral weeks before and several weeks after the execution of said note, and had transacted business with him, particularly about seventeen days after the execution of said note. Said Austin described Walker's conversation and conduct on that occasion, for the purpose of showing his sanity, both before and after the execution of said note. The defendant moved to exclude that part of Austin's testimony which related to his interview with Walker seventeen days after the execution of the note, on the ground that it was illegal and irrelevant; which motion the court overruled," and the defendant excepted.

The defendant also introduced evidence tending to show, substantially, the facts set forth in his sixth plea; and prayed the following charge: "That, if the jury believed the above facts, they should find for the defendant; which charge the court refused to give, and the defendant excepted." The jury having found a verdict for the plaintiffs, the court rendered judgment against the defendant.

The errors assigned are:

1. The ruling of the court on the several demurrers;.
2. The matters shown in the bill of exceptions;
3. The appointment by the court of a guardian *ad litem;*
4. The rendition of judgment against said Walker, who was then a lunatic.

MORGAN & WALKER, for plaintiff in error:

1. It was competent to show what was the consideration of the note sued upon. Long v. Davis, 19 Ala. Rep., 801; 10 ib., 163; 7 ib., 798; 11 ib., 913; 2 ib., 280; ib., 135; 6 ib., 146.

2. The consideration of the note was a general retainer of the defendants, as attorneys at law, in the defence of the prosecution for murder. From this retainer there arose, at least, the implied obligation that the attorneys would defend the suit, and until this obligation is performed the attorneys could only recover a just apportionment of the note. Long v. Davis, *supra;* 7 Term R., 121; 10 B. & C., 877; 2 Bailey's Rep., 488; 9 Moore, 159; 3 Watts, 331; 8 Mees. & W., 858; 2 Smith's Leading Cases, 15; 10 East 564; 1 Camp., 78.

3. An express agreement to defend the prosecution for

murder need not be proven in this case, but would be implied from the retainer and the circumstances of the case. The note was made at one term of the court, to perform services which it was expected would be required at the next term at furthest. 15 Mass. 1; 9 ib., 78.

4. An express agreement is set up in the pleadings, as the consideration of the contract, (not as a condition or qualification,) and the entire performance of that agreement must be shown, to entitle the attorneys to recover the entire amount of the note. Walke v. McGehee, 11 Ala., 276.

5. If it was the intention of the parties to make the day of payment of the note to happen after the services, which were the consideration of the note, were to be performed, no action could be maintained for the money before performance. 4 Rand. Va. Rep., 355. These facts are averred in the pleadings, and do not infringe at all upon the rules relating to the admissibility of parol proof to vary and contradict a written instrument; if the consideration can be shown, it follows that when it is shown it explains the intent of the parties and gives effect to the contract. The intent of the parties, as expressed in the note, is, that the money shall be paid six months after date; but the consideration is, that the plaintiffs will defend the prosecution for murder. The law looks to the consideration, to determine how far it will give effect to the contract, and if it has failed the contract fails; if it has failed in part, the contract fails in part. Thus the terms of the contract are not varied by the proof. If the plaintiffs had died, no recovery could be had, except so far as the consideration had been performed, and so of the defendant; and so if the defendant becomes lunatic, and it is impossible for the plaintiffs to perform the whole undertaking without the fault of defendant.

6. It was certainly the duty of the court to allow the defendant to show the circumstances under which the note was made.

7. The insanity of the maker of the note was a contingency in reference to which the parties did not contract, and it is as much a visitation of God, as the death of the maker of the note would have been. Is it a presumption of law that an insane man will become sane; and if so, should not the plain-

tiffs have waited until the defendant was in a condition to take some benefit from his contract? Suppose, after the recovery in this case for unperformed services, the plaintiffs should die, and the defendant should be restored, would the death of the plaintiffs give the defendant a right to recover back the money paid?

8. The judgment is erroneous, because rendered against the lunatic himself in person.

9. A court of law has no power to appoint a guardian *ad litem* to defend a case; not having the power, it makes no difference if the guardian consents to act, as he cannot bind the estate of his ward. The defendant's counsel could not consent for him in such a matter.

C. C. CLAY, Jr., *contra:*

1. The fifth plea is bad, for it alleges a contract inconsistent with and repugnant to the note. The note is payable six months after date; the plea alleges, that the agreement was that the note should be paid at the same time the defence was made, which might happen at a different time from the maturity of the note. West & West v. Kelly's Ex's., 19 Ala., 359. It alleges that the note was payable "on condition and for the consideration that plaintiffs would defend him," &c. If this be construed to mean, that the note was only payable on condition that plaintiffs defended him at the Spring term, 1849, it would destroy the legal effect of the note, and would, moreover, be absurd. 19 Ala., 354. If it means that the promise that plaintiffs would defend him was the consideration, that is sufficient to support the action. 11 Ala., 276; 10 Johns., 91, (94.) But no time for the trial of Walker, or the defence of him by plaintiffs, was or could be fixed by the parties, or is alleged in the plea; and when no time is fixed for the performance of that which is the consideration of the note, the action may be brought before performance by plaintiffs. 1 Chitty's Plead., 323. The time of payment is fixed by the note, and might happen before the defence of the maker, which was its consideration. Hence, making the defence was not a condition precedent to the right to demand the money. See above cases, and Jones v. Somerville, 1 Port., 457; 1 Ala., 136.

2. The sixth plea is obnoxious to all the objections to the fifth plea. The same legal principles and authorities above cited apply to it; moreover, Walker's insanity did not discharge plaintiffs' obligation to defend him, and, therefore, he is not discharged from his obligation to pay the note; otherwise the mutuality of the contract is destroyed. Even Walker's death would not have defeated plaintiffs' right to recover. The contract could not be rescinded, unless the parties could be placed in the same situation, and on the same terms existing when the contract was made, except by mutual consent. This could not be done, because plaintiffs had already performed some services, as the plea admits, and were prevented by his retainer of them from taking a fee on the other side. Chitty on Con., 742; 2 Ala., 181; 3 ib., 237; 9 ib., 452. Besides, how could he rescind, if insane, or his guardian or attorney rescind for him? If plaintiffs should die after recovery in this case, and before defending Walker, and he should be restored, (as supposed by the counsel,) he would have the right to recover the money paid; and, if he should be restored, and plaintiffs would not defend him, he would have his remedy. 1 Chitty's Plead., 323.

3. Plaintiffs' replication to the second plea was good, and defendant's rejoinder bad, for the same reasons above set forth. The character of the pleas, whether good or bad, depends on the same principles referred to above.

4. The charge asked was properly overruled, for the same reasons the demurrer to the pleas was sustained. Further, it was not warranted by anything in the pleas, or by the testimony.

5. The motion to exclude Austin's testimony was properly overruled. It was admissible. 2 Greenl. Ev., § 371; 16 Ala., 680; 17 ib., 437. At all events it was only rebutting defendant's evidence.

6. The appearance by guardian *ad litem*, or appointment of one to defend, is not assignable for error. 4 Denio, 262; 2 Saund. Rep., 336. Besides, the record shows he appeared by attorney, and judgment was rendered against him.

7. The judgment could be rendered against no one but the lunatic.

GIBBONS, J.—1. The first question of law that arises upon the pleadings, in this case, is, whether a party, who has given a note payable at a particular day, upon the consideration that the payee agreed to perform certain services for him, but without any time being fixed when the services should be performed, can, when the payee is in no default, but able, ready, and willing to comply with the contract on his part, defeat a recovery on the note, on the ground, that the payee has not yet rendered the entire services contemplated by his agreement. The simple statement of this question suggests the answer. He cannot. We do not now deem it necessary to enter into an argument to show the reasons why he cannot. These reasons, and the numerous authorities upon this subject, are familiar to the profession. It is sufficient to say, that the consideration of the note being the agreement of the payee to perform the services, and the payment of the money not being made to depend upon the performance as a condition precedent, and the payee being in no default, the note remains obligatory upon the maker. We do not mean to say, that the maker of a note may not show a total or a partial failure of consideration. He undoubtedly can. But the above question does not involve a failure of consideration, but simply a non-performance of the services contemplated by the agreement, which was the consideration of the note, without any default or omission on the part of the payee. This is not a failure of consideration, and the agreement remains mutually as binding upon the parties as it ever was.

If the payee of the note had failed or refused to perform the services stipulated, that would be a failure of consideration; but until he does some act, or omits to perform some duty to which he was bound, and which puts him in default, the consideration of the note cannot be said to have failed in any respect.

This question being thus settled, necessarily disposes of the demurrers to the plaintiffs' replication to the second plea, and to the defendant's rejoinder to the same replication; and it follows as a necessary consequence, that the court decided the law correctly in overruling the demurrer to the former, and in sustaining that to the latter.

2. It is a principle of law equally well settled that a party,

cannot introduce parol proof, to materially alter or vary a written agreement. West & West v. Kelly's Ex'rs., 19 Ala., 353. If the contract is not perfect in itself, or, in the language of C. J. Dargan in the case above cited, "if it be apparent that the instrument in writing contains but a part of the agreement entered into by the parties, then parol proof may be received to prove the entire contract; otherwise the contract could not be brought before the court. But the parts of the agreement proposed to be proved by parol, must not be inconsistent with, or repugnant to the intention of the parties, as shown by the written instrument; for, to receive parol proof of a part not reduced to writing, which is directly repugnant to the intention of the parties as expressed in the written instrument, would at once annul the rule that parol evidence cannot be received to contradict or vary the terms of a written agreement." See also Long, Ad nr., v. Davis, 18 Ala., 801.

Let us apply these principles then to the fifth plea. It states, in addition to the matter contained in the rejoinder to the plaintiffs' replication to the second plea, that at the time the note was executed it was the understanding of the parties that Walker would be tried at the next term of the Circuit Court, and that the note should become payable at the time that the said Walker should be tried. We understand the meaning of the plea to be, that the note was not to become payable until the services contemplated by the agreement were rendered. If this is the meaning of it, (and it is the only one we can attach to it) it is repugnant to the face of the note, and makes a materially different contract between the parties. This the law will not permit. If the contract was, in effect, what the plea states it to be, it was the misfortune of the party that it was not correctly expressed in the written agreement, but a court of law has no power to reform it. The plea is bad, and the demurrer to it was correctly sustained.

3. The gist of the sixth plea is, that Walker has not been tried in consequence of his insanity, and that the guardian *ad litem* had tendered to the plaintiffs the sum of fifty dollars, averring that to be a reasonable compensation for the services which they had rendered in the prosecution pending against the said Walker, and had demanded of the plaintiffs a rescis-

sion of the contract, and that this offer was refused by the plaintiffs; but in consequence thereof the plea claims that the contract is rescinded. Waiving all questions as to the formality of this plea, and about which we express no opinion, we only deem it necessary to say, as to the subject matter of it, that as it requires in law two parties to make a contract, so it requires two parties to rescind one. It is true, the law will sometimes rescind a contract in favor of one party, on account of the default or misconduct of the other; but when he who seeks a rescission can allege no default or misconduct against the other party, he cannot at his election annul it. It requires the consent of both parties to rescind, as it did to make it. The demurrer to the sixth plea was therefore properly sustained.

4. It is insisted that the court erred in allowing the witness Austin, introduced by the plaintiffs, to testify as to the condition of Walker seventeen days after the execution of the note. The bill of exceptions shows, that the defendant introduced testimony tending to show that the said Walker was insane "at, after, and before the time of the execution of the said note." This testimony, we presume, was offered under the plea of *non est factum*, seeking to avoid the note on the ground of insanity; and we think it clear that the testimony of Austin was admissible, as tending to rebut the testimony of the defendant on this issue. 2 Greenleaf Ev., § 371; McLean v. The State, 16 Ala., 672; McAlister v. The State, 17 Ala., 434. We do not think that seventeen days after the execution of the note was too remote to render the testimony irrelevant.

5. The defendant below requested the court to charge the jury, that if they believed certain evidence set out in the bill of exceptions, they must find for the defendant. The court refused the charge, and this is also assigned for error. On looking at the evidence on which this charge was prayed, it will be found to be substantially the facts set out in the sixth plea. This plea was demurred to, and the demurrer was sustained. There was no issue before the jury authorizing this evidence to be received, and we have already passed upon the legal effect of the facts alleged in this plea. The charge was properly refused by the court.

6. It is also assigned for error that the court below appointed a guardian *ad litem* for the said Walker. Mr. Chitty says, "an idiot should also appear in person; and it is said that any one who can make a better defence, shall be admitted to defend for him; but a lunatic, or one who becomes *non compos mentis* must appear by guardian, if he be within age, and by attorney if of full age." 1 Chitty's Pl., 469; see also 2 Saund., 333, note 4, 335; Bacon's Abr., title, Idiots and Lunatics. In the case of Buchanan v. Rant, 2 Monroe, 114, the court decided that lunatics within age must appear by guardian; those of mature age by attorney. To the same effect also is the case of Amos v. Taylor, 2 Brevard, 20. On the other hand, in Allison v. Taylor, 6 Dana, 87, it was held that a judgment against a lunatic, in a case where the process was served upon him alone, and the judgment rendered by default, was not void, although the court intimate that such a judgment would be reversed on error, because the committee man was not made a party.

The record in this case shows, that the defendant pleaded both by guardian and attorney; the language is, "the said George Walker by his guardian *ad litem*, Daniel M. Martin, and by attorney, comes and defends, &c." The question then would seem to be narrowed down to this: does the simple appointment by the court of a guardian *ad litem*, although the defendant still pleads by attorney, amount to error? We have no hesitation in saying that it does not. We do not wish, however, to be understood as expressing an opinion upon a case where the record did not show that the lunatic pleaded by attorney: we limit our decision to the precise case presented by the record. Besides, the record in this case would indicate that the guardian *ad litem* was appointed at the instance of the defendant's attorney; and it never could be tolerated, that he could be heard here in assigning for error that which he had himself caused to be done below; this would be to permit a party to take advantage of his own wrong.

7. It is insisted, in the last place, that the court erred in rendering judgment against the lunatic. This objection is in some measure answered by what we have said in reference to the last noticed assignment of error. We do not see how the judgment could have been rendered against any party other

than the lunatic. It was his debt; he had the capacity, as we have seen, to appear in court by attorney, and the legal title to his estate was still in him. The guardian that was appointed to take charge of his affairs did not, like an administrator, take the legal title to any of the property or assets that came to his hands. Cameron v. Pottinger, 3 Bibb, 11; Crane v. Anderson, 3 Dana, 119. The lunatic then was the only party against whom judgment could have been rendered. Clarke v. Dunham, 4 Denio, 262.

We find no error in the record, and the judgment is consequently affirmed.

THOMPSON *vs.* THORNTON.

1. The grantor in a deed of trust who remains in possession of the personal property conveyed by it after default made, has not such an interest as is subject to be levied on by attachment, when the deed gives the trustee power to sell so much of the property as will pay the demands then due; and this, although only a portion of the demands secured is due and unpaid at the time of the levy of the attachment, and the property conveyed greatly exceeds in value the sum due.

ERROR to the Circuit Court of Sumter.

Tried before the Hon. TURNER REAVIS.

DETINUE by Henry R. Thornton against James H. Thompson, for the recovery of certain negroes and other personal property, which the plaintiff claimed under a deed of trust executed to him, as trustee, by Albert G. Loftin, and which the defendant, who was the sheriff of Sumter county, had taken in attachment as the property of said Loftin.

The case was tried upon an agreed statement of facts, which is set out in the bill of exceptions. The deed of trust under which the plaintiff claimed was dated February 8, 1848, and was made to secure the payment of certain promissory notes due to one Samuel K. Bradford. The deed contains the following clause: "But in case the said Loftin shall fail to pay either of said notes at maturity, then the said Thorn-

ton shall, at any time after the expiration of thirty days from such default, on giving thirty days' notice of the time and place of sale, by advertisement posted upon the court-house door in the town of Livingston, expose to public sale, for cash, before said court house door, a sufficient quantity of said property, real or personal, as shall be sufficient to pay off, satisfy and discharge the amount due on said notes, at the time of such sale, and all costs and expenses thereon; and from time to time, as said notes fall due, and default is made in the payment of the same, the said Thornton shall, in like manner, and under the same restrictions, sell any or all of said property, real or personal, for cash, and apply the proceeds of such sale to the satisfaction and discharge of such sums as may be due on said notes," &c. "And it is agreed between the parties to this indenture, that the said Loftin shall remain in the peaceable and quiet possession of all the property herein conveyed, until such time as it may become necessary for the said Thornton to take possession of the same, to carry out the provisions of this deed."

"It was admitted that the transaction," in relation to the deed of trust, "was fair and *bona fide*;" that said Loftin retained possession of said negroes and other property conveyed by the deed, until April 17, 1850, when the defendant levied an attachment upon them at the suit of Boykin, McRae & Foster against said Loftin; that, at the time of the levy, the first one of the secured notes had become due and been paid, and a part payment had been made on the second, which was also past due, but the balance were unpaid; that the property conveyed by the deed was largely more than sufficient to pay the balance of the debts due at the time the action was brought.

Upon these facts, the question was submitted to the court, whether there was a leviable interest in Loftin at the date of the levy; and the court charged the jury, that there was not.

Wm. M. Brooks, for plaintiff in error:

1. The first question presented is, whether the interest of the grantor in a deed of trust of personal property, who remains in possession after default, is subject to be levied on by attachment. This court has decided, in several cases, that,

after default, the interest of the grantor, even though he be in possession, cannot be levied upon by execution. 4 Ala. 469; 5 ib. 771; 8 ib. 694; 19 ib. 723. The last three of these cases rest entirely upon the authority of the first, and for it no authority is referred to, nor any good reason assigned. These cases conflict with others, which lay down the rule generally, and without qualification, that where the grantor in a deed of trust or mortgage is in possession of the property conveyed, his interest may be levied upon and sold. McGregor v. Hall, 3 Stew. & P. 397; Purnell v. Hogan, 5 ib. 192; Perkins v. Mayfield, 5 Porter, 182; Williams v. Jones, 2 Ala. 314; 12 ib. 547. The cases first cited seem to turn on the fact, that after default, and not before, the trustee or mortgagee is entitled to possession, and acquires the entire legal title. This fact was not considered a sufficient reason for so material a distinction in Gardner v. Morrison, 12 Ala. 547, in which it is held, that after default, a mortgagor in possession may convey to a second mortgagee such an interest as will enable him to maintain detinue. Besides, a mortgagee has the right of possession, before default, in all cases where it does not appear, by express stipulation or necessary implication, that the mortgagor shall remain in possession. 12 Ala. 547; 1 ib. 729; 13 Shep. 499; 12 Metcalf, 308; 2 Shep. 48. His right to the possession, then, is the same before default that it is after, in the absence of an express stipulation. There must, then, be a right of possession, as well as the fact, to authorize a levy before default; where that is the case, and there is a levy and sale, the purchaser acquires, not only the right of possession, but the equity of redemption. 19 Ala. 753; 8 ib. 706. It is not merely the possessory interest that may be levied upon. There is no greater virtue in a possession under a stipulation for it, to authorize the sale of the equity of redemption, than in a possession without such a stipulation, or after default; and, therefore, there is no reason why a levy should not be made as well after default, as before. 2 B. Monroe, 41; 1 Barb. 542.

But, even admitting that an *execution* could not be levied on an equity of redemption, accompanied by possession, after default, it does not follow that an *attachment* cannot; for they stand on very different grounds. An execution only goes

against the "goods and chattels;" an attachment runs against the defendant's "estate;" and every thing that can be included in the terms "estate," "property," "effects," "goods," "chattels," "money," and "land," may be levied upon by it. Clay's Digest, 199 § 1, 54 § 3, 55 § 6, 56 § 8, 57 § 11, 60 §§ 29, 33, 63 § 38; also Bouv. Law Dic. Titles, Estate and Property; Lyon v. Coburn, 1 Cush. 278. The attachment laws were intended to enable the creditor to reach everything belonging to his debtor.

2. At the time of the levy in this case, the property was largely more than sufficient to pay the entire debt secured; the grantor was in possession of it; and there was only a default as to the second instalment. By the terms of the deed, the trustee was prohibited from selling more than sufficient to discharge the default; and the grantor was entitled "to remain in peaceable and quiet possession of all the property conveyed, until such time as it should be necessary for the trustee to take possession." If the trustee only had the right to sell enough to pay the default, he could not take possession of all; and the grantor then had an interest in a part, which was subject to levy. It was the duty of the trustee to designate what part he would elect to sell; having failed to do this, and demanding all, he was not entitled to recover in this action at all. This does not conflict with the case of Magee v. Carpenter, 4 Ala. 469.

R. H. Smith, *contra:*

The question in this case is settled for the defendant in error, by the cases of Hawkins v. May, 12 Ala. 673, and Fontaine & Dent v. Beers & Smith, 19 ib. 723. These cases are entirely consistent with the other decisions cited as adverse by the plaintiff's counsel.

The rights of Thornton to sue do not depend on the amount of the debt due, or of the value of the property. That is an inquiry for chancery. Bell v. Pharr et al., 7 Ala. 813.

To hold that an attachment could be levied on an equitable estate, which the execution, obtained as a consequence of that attachment, could not sell, would be to hold an anomaly in jurisprudence. It would be to make an inchoate right greater than a perfect one. Hale v. Cummings, 3 Ala. 398.

CHILTON, C. J.—The question involved in this case is, whether the grantor in a deed of trust, who remains in possession of personal property conveyed by the deed to a trustee, after default, and when the trustee has a right to sell so much of the property as shall pay the demands then due, has such an interest as is subject to be levied on by attachment. No question is raised as to the validity of the deed of trust; but conceding that it is valid, the counsel for the plaintiff in error insists, that, as only a portion of the demands secured by the deed was due and unpaid at the time of the levy of the attachment, and the property conveyed was worth greatly more than the sum thus due, and as the trustee could only dispose of so much as was sufficient to satisfy the sum due, the grantor in the deed was entitled to the possession of the residue, and, consequently, had such an interest as could be levied upon.

It is well settled by the decisions of this court, that the grantor in a deed of trust, or the mortgagor, before the law day or default of payment, in cases where such grantor or mortgagor retains the possession of the property, has such an interest as may be levied on and sold. McGregor & Darling v. Hall, 3 S. & P. 397; 5 ib. 192; 5 Por. 182; 2 Ala. R. 314; 12 ib. 547. But it is equally well settled, that, after the law day or default, such property is not subject to be levied on; for then the mortgagee has the right to enter, or in case of a trust deed, the trustee has the right to the possession of the property, and the right of the grantor or mortgagor is purely the right to redeem; an equitable right, which, being disconnected from the legal right of possession, is not subject to be levied on by legal process. See the cases of Magee v. Carpenter, 4 Ala. 469; Planters' & Merchants' Bank v. Willis, 5 ib. 771; Marriots & Hardesty v. Givens, 8 ib. 694; Fontaine v. Beers, 19 ib. 723. These cases are entirely reconcilable with the decisions previously referred to.

The case of Bell v. Pharr & Beck, 7 Ala. 813, is conclusive to show that the amount of the default and the disproportion between it and the value of the property does not affect the right of the trustee to recover, and cannot consequently confer the right upon the grantor to retain the property, or any portion of it, as against the trustee, or of the creditor to levy upon it.

The default goes to the whole property, and it is not for the grantor or any creditor of his to elect for the trustee which article of property he shall first sell. His right attaches to the whole, and converts the right of the grantor into an equity which is not the subject of levy at law.

The view of the law taken by the Circuit Court, conforms to that we have above expressed.

The judgment must therefore be affirmed.

MICHAN AND WIFE *vs.* WYATT.

1. When a bill is filed in the name of husband and wife, respecting the wife's separate estate, and at the hearing the wife moves the court for leave to amend the bill, by making her husband a defendant, and inserting the name of some responsible person as next friend, the action of the Chancellor upon the motion is discretionary, and his refusal to grant it not revisable on error.
2. To authorize the dismissal of a bill on final hearing on account of the misjoinder of complainants, the misjoinder must be of complainants whose interests are so diverse that the Chancellor cannot include them in one decree, or, at least, must differ so widely as materially to affect the propriety of the decree.
3. Where a bill is in form the bill of husband and wife, yet, in substance and fact, it only concerns the separate estate of the wife, and seeks only to establish her rights and protect her interests, and asks no relief for or against the husband, he will be regarded as her next friend or trustee, and the decree rendered will be conclusive on the wife.
4. But if the bill seeks relief either for or against the husband, the Chancellor should order it to stand over, until it can be reconstructed, so as to make the husband a defendant, and interpose a next friend to prosecute for the wife; and this, whether the objection be made by demurrer, plea, answer or for the first time at the hearing; but in the last case, it is left to the sound discretion of the Chancellor, whether he will allow it, or dismiss the bill without prejudice to the wife.
5. A transcript of the record of a judgment against the husband, is not admissible evidence against the wife under a bill filed, in the name of the husband and wife, concerning her separate estate.
6. The statutes of this State requiring the registration of certain conveyances which create incumbrances on the title, do not include a deed of gift, executed in another State, by which slaves are given to a married woman, "during her natural life, to her separate, sole and exclusive use and behoof," and at her death to her children. Such a deed is not an incumbrance on the title, but the evidence of the title itself; and the possession of the husband and wife under it will be referred to the title, and the husband will be considered the trustee for the wife.

7. The statute of limitations does not bar a married woman from recovering her separate property, sold under execution against her husband, when her title accrued during coverture.

ERROR to the Chancery Court of Perry.

Heard before the Hon. W. W. MASON.

The bill in this case was filed by John Michan and wife against William N. Wyatt. It alleges, that, on the 4th of October, 1819, Nancy Renwick, the mother of Leah Michan, who then resided in the State of South Carolina, was possessed in her own right of three slaves, named Sarah, and her children, Spencer and Young; that on that day she conveyed said slaves to Mrs. Michan by way of loan for her life, for her sole and exclusive use and benefit, and at her death to her children in equal portions; that Mrs. Michan was then a *feme covert*, living with her husband, John Michan, in the State of South Carolina, and that the slaves were delivered into her possession; that since said loan and delivery, she, with her husband, has removed to Alabama, and brought the slaves with them; that the object and intention of Nancy Renwick in making the deed for the slaves in the terms in which it is made, was, to create a separate estate in said Leah, free from the control and interference of the husband, or any other person whatever, and to protect her in the sole and exclusive use of said slaves; that the woman Sarah had other children, to-wit: Ann (who has two children, Richard and an infant,) and Dick, together with others which are not named in the bill; that in the month of January, 1843, one Thomas R. Williams of Benton county, and one James H. Michan, son of complainant, obtained possession of the slaves Young, Dick and Ann, also the children of Ann then in being, against the consent and will of Leah Michan, and carried them away from the county of Randolph, where they then were, in the employment of said Leah and her husband, to the county of Perry, where said Williams sold said slaves to William N. Wyatt, who still has them in his possession, and claims them as his own; that he refuses to deliver them to Leah Michan, the complainant, although they have been demanded of him. The bill then sets out the value of the slaves; that they are family slaves, to which complainant Leah is greatly attached,

she having raised most of them in her dwelling house with her own children; that the slaves are greatly attached to her, and their value in money would be no adequate compensation to her for their loss. The bill prays for a restitution of the slaves, and an account for their hire since they have been in possession of the defendant. It is also prayed, that a trustee be appointed; and for general relief. The deed exhibited with the bill is in these words:

"The State of South Carolina, Newberry District: Know all men by these presents, that I, Nancy Renwick, of the State and District aforesaid, for and in consideration of the natural love and affection which I have for my daughter, Leah Michan, of the District and State aforesaid, have freely and voluntarily lent, and by these presents do hereby lend unto my said daughter, Leah Michan, a negro woman named Sarah, and all her future increase, and also her two children, Spencer, about two years old, and Young, about nine months old, which said three negroes, and the future increase of the said Sarah, I lend to the said Leah Michan during her natural life, to her separate, sole and exclusive use and behoof; and after her death, I give and grant the said negroes, and the future increase of the said Sarah, to the children lawfully begotten of the said Leah, share and share alike, as tenants in common, without any right of survivorship. In witness whereof, I have hereunto set my hand and seal, this 4th day of October, A. D. 1819.

In the presence of NANCY RENWICK, [Seal]"
JOHN BANSKETT."

Wyatt answers, that he knows nothing of the deed under which Leah Michan sets up her claim to said slaves, and calls for proof of its existence and terms; that if it does in fact exist, it has never been recorded; that he is a purchaser for valuable consideration; that said slaves were bought by one Williams at sheriff's sale, under execution on a judgment against John Michan, and sold by Williams to him; that he inquired of one Goree, to whose house the slaves had been sent by the complainant, as to the title, who told him it was good; that Leah Michan knew of the sale by the sheriff, was present at it, by her agent, James H. Michan, and suffered the slaves to be sold, without in any manner making known her

claim; that more than six years intervened between the sheriff's sale and the filing of the bill. He insists on the lapse of time as a bar to the suit, and demurs for want of equity, and misjoinder of complainants.

The demurrer was overruled by the Chancellor.

At the hearing, Leah Michan moved the court for leave to strike the name of John Michan from the bill, and to make him a defendant; and also for the privilege of inserting in the bill, the name of some person as next friend. This motion was disallowed, and a hearing was had on the bill, answer and proof.

The proof is substantially this: B. L. Goodman proved the genuineness of the hand-writing of John Banskett, the subscribing witness to the deed for the slaves made by Nancy Renwick to Leah Michan, mentioned in the bill, and attached to it as an exhibit. He also proved that said subscribing witness resides in Edgefield District, South Carolina.

Nathan Renwick testifies, that he is the brother of Leah Michan; that the complainants are husband and wife; that Leah Michan has had possession of the slaves named in the deed from Nancy Renwick since 1819—a part of the time in South Carolina, a part in Georgia, and then in Alabama;—that the slaves, Young, Dick and Ann, now in controversy in this suit, are the children of the girl Sarah mentioned in the deed, and were in possession of the defendant on the 31st of May and 1st of June, 1849; that Banskett, the subscribing witness to the deed of Mrs. Renwick, resides in the State of South Carolina.

William H. Anderson testifies, that complainants are husband and wife; he proves also the color and age of the slaves, the possession in Georgia and Alabama by Leah Michan; that they are family slaves; that Mrs. Michan's possession continued up to 1842; that complainants knew when the slaves were taken out of their possession; has heard John Michan say, that the slaves were taken from his residence to prevent their being sold for the payment of his debts; he never heard Leah Michan say the same; he is not certain, but thinks he heard complainants say, the negroes were about to be sold under an execution against John Michan; heard them speak of the sale after it had taken place; heard them say, the ne-

groes had sold for more than enough to pay the execution, and heard John Michan say he had sent for the balance.

John Long testifies, that he had seen the slaves mentioned in the bill in the possession of John Michan, in Georgia and Alabama, some of them for twenty years; that he and James Michan, the son of complainants, took the negroes, Ann and her child Dick, and the boy Young, to Perry county, and left them with Goree in the town of Marion; that James Michan asked him to aid him to take the slaves from Randolph county; that the negroes were taken from the gold mines, and not from the residence of John Michan, which, at the time, was in Cherokee county, about sixty or seventy miles from the mines; that neither John nor Leah Michan ever said any thing to him on the subject until after witness returned from Perry county, and not then until witness told John Michan where and with whom the slaves had been left; when John Michan replied, it was all right. He does not know whether Leah Michan was present and heard this conversation or not; he has never heard her say any thing about it; he had hired these slaves before taken to Perry county, and settled with John Michan for their hire; John Michan managed them, and Leah Michan exercised over them only such control as wives ordinarily do over the slaves of their husbands; he does not know for what reason the slaves were taken to Perry county, but has heard that it was to prevent them from being levied on for a debt on which John Michan was security.

Wm. Michan testifies, that the slaves in controversy, which were bought by defendant, were reputed to be the children and grandchildren of the girl Sarah; that from witness' earliest recollection they were in possession of John and Leah Michan, (his parents,) but claimed by Leah as her separate estate; that, in 1842, they were sent to Perry county, to be hired out; James H. Michan took them there, and was Leah Michan's agent for that purpose; the hire was to be used for the support of the family; the slaves were raised by complainants, and treated as their own children; they were easily governed, and their characters and dispositions were good; there were executions against John Michan, but witness does not know whether the slaves were removed on that account;

heard his mother say that the negroes should not be sold; Leah Michan knew when the slaves were taken to Perry county, and in whose possession they were there left, and was satisfied with the arrangement.

John Hartsfield testifies, that he knew the complainants as husband and wife; knew the slaves from 1828 to 1838; they were family slaves; John Michan, as head of the family, managed them, and Leah Michan acted towards them as other wives do towards their husbands' slaves; never heard her say they belonged to her husband.

Blueford Gross proves substantially the same facts that were proved by Hartsfield. This, with the deed from Mrs. Renwick, and a transcript from the Court of General Sessions and Common Pleas for Newberry District, South Carolina, showing the deed to have been duly recorded in the clerk's office of that court on the 7th October, 1819, was all the testimony introduced by complainants.

Tabitha Cox testifies, that she resided within a half mile of the complainants when they lived in Cherokee county, Alabama; was intimate with them, and was visited by Mrs. Michan; that Mrs. Michan told witness, a few days after the slaves were taken away in 1842, that her husband and some other persons had held a conversation the night on which the negroes were sent away, and had resolved to send them off; that she, Mrs. Michan, made preparations for their start, and they were taken away in the night, and that Long and Jas. H. Michan had carried Ann and her child to Newberry District, South Carolina.

Littleton Long testifies, that the slaves were in possession of complainants until 1841 and 1842; in the latter year, there being executions in the hands of the sheriff of Cherokee county against John Michan, witness went to his house, and told Leah Michan that such was the case, and gave it as his opinion that the sheriff intended to levy them on Ann and her child, who were the slaves then in possession of complainants: on the night of this day the slaves were sent away by James H. Michan, a favorite son of complainants; he afterwards learned from them that they had been taken to Perry county, and hired to one Goree. The slaves were in the possession of John Michan and his wife while witness

knew them, and he never heard Leah Michan claim them as her separate property.

John Long, when examined by defendant, proves substantially what he testified when examined by complainants, with this addition, that he had known complainants for fifteen or twenty years, and never heard Leah Michan claim the slaves as her separate property until, after they had been taken by himself and James H. Michan to Perry county.

M. E. Gary testifies, that he levied an execution in favor of one Crawford v. John Michan, in the county of Sumter, on three slaves, and sold them, no person forbidding the sale; he does not remember the names of the slaves, or who bought them; they sold for more than enough to satisfy the execution, and he paid the balance to one Isaac E. Payne, on an order in favor of said Payne, drawn by John Michan. The order spoken of and the receipt of Payne are attached to his deposition. The former is drawn by John Michan, and attested by Mordica Brown, J. P., and simply requests Gary to pay Payne the surplus on the sale of the slaves.

A transcript of the record in the case of Crawford v. Michan, is next found in the record, which shows the judgment, execution, and return of Gary, by which it appears that one Thomas R. Williams was the purchaser of the negro slaves Dick, Ann and Young, at the sheriff's sale in Sumter. This return is dated January 3, 1843. Accompanying this return is found a paper in the following words: "The State of Alabama, Sumter county: I do hereby release Matthew E. Gary, sheriff of said county of Sumter, from all liability he has incurred, or may incur, by reason of his levying upon and selling by this execution, as the property of John Michan, the certain slaves named Dick, Young and Ann, and waive all suits against him. Given under my hand and seal, this 2nd day of January, 1843. JAMES H. MICHAN, [seal.]"

Joseph L. Long testifies, that he has known complainants sixteen or seventeen years; knows the slaves in controversy; heard Leah Michan, in 1842 or 1843, say they were at Goree's in Greene or Perry county; she expressed her uneasiness lest her husband's creditors should find them, and sell them for his debts; she directed her son Joseph H. Michan, and one Simms, to go and remove them, but to what place wit-

ness does not remember; John Michan was about the house when this conversation took place, but witness does not know that he heard it; Leah Michan told her son and Simms to hurry and remove the slaves.

Langston Goree proves, that James H. Michan and John Long, in the Spring of 1842, brought the slaves Dick, Young and Ann, (with an infant child of Ann's, which died shortly after he received them,) to his house; that they delivered him a letter (now lost) from John Michan, stating that the slaves had been sent to him to prevent their being levied on and sold for his debts; that he desired the witness to take them under his management, until the danger was past; witness received and kept them until October of that year, when he delivered them to one Simms, who took them, by direction of witness, to one Ashford's in Sumter county; he saw no more of them until he saw them in possession of Thomas R. Williams, who sold them to defendant; when defendant was about to purchase, he inquired of witness about the title to the slaves; witness told him he thought it was good, and if he had the money he would purchase them himself; defendant then bought them; witness knew complainants in South Carolina, never heard Leah Michan claim said slaves as her separate estate, or even intimate such a claim.

Isaac E. Payne testifies, that, after the sale of the slaves by the sheriff of Sumter, John Michan gave him an order to said sheriff for an overplus of funds in his hands; he got the money on the order, retained a part which John Michan owed him, and paid the remainder to a garnishment in favor of one of John Michan's creditors; Leah Michan did not sign the order, but was present when it was first spoken of, and said they would like to get the money, if it would not prejudice her right in a suit she had then brought, or was about to bring, for the slaves.

The defendant purchased the slaves from Williams, on the 27th day of January, 1843, and the bill in this case was filed on the 19th day of January, 1849.

On the hearing, the complainants objected to the reading of the transcript of the record from Cherokee county, in the case of Crawford v. John Michan; but the objection was overruled by the court. The Chancellor dismissed the bill.

The errors assigned are:

1. The court erred in dismissing complainants' bill, at the costs of complainants;

2. The court erred in the final decree rendered;

3. The court erred in dismissing the bill, and refusing the relief sought by it;

4. The court erred in overruling complainants' motion to strike out the name of John Michan as complainant, and to make him a defendant, and to insert the name of some person as *prochein amy* of Leah Michan;

5. The court erred in not decreeing relief to Leah Michan, and in not appointing a trustee for her.

BELSER & RICE, for plaintiffs in error:

1. This suit is brought in relation to the wife's separate property. The husband is joined as plaintiff, merely because the forms of law do not permit a married woman to sue in her own name alone. He has no interest in the subject-matter of the suit, and claims none; and no relief is sought by or against him. The wife having no trustee, the law makes the relation of the husband to the suit, that of her next friend. Such a suit is the suit of the wife. Trustee and *cestui que trust* may join as plaintiffs; and there is no misjoinder of complainants in this suit. Boykin v. Ciples, 2 Hill's Ch. R. 200; Berry v. Tibbats, 11 B. Monroe, 256; Wilson v. Wilson, 6 Ired. Eq. 236; State v. Reigart, 1 Gill's R. 29; Kenny v. Udall, 5 Johns. Ch. 473; Bein v. Heath, 6 How. U. S. R. 239.

2. The modern English practice, alluded to in Bein v. Heath, *supra*, which seems to be followed in New York, rests upon one reason only, viz: that the decree, if adverse to the wife's claim, will not bar her from a subsequent suit, in her own name, by her next friend, for the same matter. The utmost benefit that the defendant can derive from an objection to the form of such a suit, is, to have the suit put in proper form to make it conclusive on the wife; which the court will do at any time, even at the hearing. But when the complainant makes the motion, at the hearing, to put the suit in proper form, by making the amendments proposed in this case, and the defendant himself objects to the motion,

and thus prevents the correction, it is a waiver on his part of his previous objection by demurrer, for the alleged misjoinder of husband and wife; the objection itself is to a mere matter of form. The Chancellor was mistaken, in supposing that he could not grant the amendment at the hearing, against the defendant's objection. Stuart & wife v. Kissam, 2 Barb. S. C. R. 493; McLane v. Riddle, 19 Ala. 180. The modern English practice ought not to be adopted here, since the passage of the act of 1848, which makes the husband a trustee for the wife. Key v. Vaughan, 15 Ala. 497.

3. The Chancellor overruled the demurrer for misjoinder of complainants; and, therefore, that objection cannot be urged here to sustain his decree, dismissing the bill on another ground. Grimshaw v. Walker, 12 Ala. 101; Gibbs v. Frost, 4 ib. 730.

4. The separate estate of a married woman is not liable to be sold under execution at law, during coverture, either for her own or her husband's debts. Haygood v. Harris, 10 Ala. 291. "And the only ground on which it can be reached in equity, is that of appointment; that is, some act of hers, after marriage, indicating an intention to charge the property." 1 Comstock's R. 452.

5. The relation of the husband to such a suit as this being that of a next friend of his wife, his acts and declarations, in respect to the matters in litigation, are not evidence in the suit, nor binding on the wife. Stuart v. Kissam, 2 Barb. S. C. R. 493; Roden v. Murphy, 10 Ala. 804; 8 B. Monroe, 32.

6. If this suit is not regarded as the suit of the wife, it must be because the decree, although adverse to her rights, is not conclusive on her. But the decree here treats the suit as the suit of the wife, and decides that her right has been lost; if permitted to stand, it is conclusive on her, and would bar any subsequent suit by her next friend. 6 Howard's R. 239, *supra*.

7. The statute of limitations has no application to such a case as this. It is a suit by a married woman, in relation to her separate estate in slaves of which she has been deprived during coverture. Her coverture existed when the separate estate was created, when she was deprived of the slaves, and still exists. No trustee has ever been appointed for her; she

could not have sued at law. Even if an action at law could have been sustained, to enforce the right which she asserts in this bill, still, the statute could not affect her right, because she is within the express terms of the proviso. Clay's Dig. 327, § 80. Even where the subject-matter of the suit is embraced by the statute, the right of a *feme covert* would not be barred or affected by it, when it is shown that she was under the disability of coverture when her right accrued, and has been so ever since. The statute does not begin to run until the coverture ceases, as to rights and causes of action accruing during coverture. Curll v. Compton, 14 Sm. & M. 56.

8. There is nothing in the idea that the wife is estopped. To maintain equitable estoppel, the defendant must be able to show that he has been injured by the deceptive and fraudulent conduct of the wife. 11 Humph. 435. Mrs. Michan did nothing, and said nothing, which influenced the purchase, either of Williams or Wyatt. The defendant swears, in his answer, that he never heard of her claim until after his purchase. The surplus proceeds of the sale were paid over to Payne, on the order of John Michan, long after the defendant's purchase. Mrs. Michan gave no authority to Payne, and received none of the money. Payne proves her unwillingness to have her husband draw the money, if it would in any way affect her rights. She has done nothing to confirm the sale, and is clearly not estopped. Johnson v. Johnson, 5 Ala. 90; McLane v. Spence, 11 ib. 172; Finn & Dulany v. Barclay, 15 Ala. 626; Pounds v. Richards et al., June term, 1852; 17 Conn. 361; 11 Humph. 435.

8. The deed creating the separate estate was executed in South Carolina, and no record of it was necessary. Lyde v. Taylor, 17 Ala. 270.

A. B. Moore, *contra:*

I. The demurrer to the bill should have been sustained:

1. Because there is a misjoinder of parties complainant, in connecting John Michan with his wife, in a suit for her separate property. If made a party at all, he must be a defendant. Dan. Chan. Prac. 142, 143, 144; 16 Ala. 87; 17 ib. 631; 4 Bouv. Inst. 295.

2. She should have sued by her next friend. See authorities, *supra.*

3. John Michan has no interest as plaintiff in the suit; he is entitled to no relief, of course, as an improper party. 1 Dan. Chan. Prac. 347, 350; Story's Eq. Pl. §§ 508, 318, 260, 261; Bowie v. Minter, 2 Ala. 406; 6 ib. 303; 9 ib. 351; 14 ib. 135.

4. The bill could not be amended, after the trial had proceeded for some time, in the manner proposed. If Mrs. Michan had sued alone, her bill would have been dismissed. If she improperly joined her husband, the same consequences must follow.

5. The practice permits some amendments, at this, or even a later stage of the case, as by adding parties in a creditor's bill; but it does not allow such an amendment as was proposed in this case, at the time proposed.

6. There is no equity in the bill, as complainant had a remedy at law, by action of detinue or trover. Hardeman v. Sims, 3 Ala. 747; Colburn v. Broughton, 9 ib. 351.

7. The allegations of the bill are not sufficient to give jurisdiction to a court of equity.

8. Equity follows the law, in regard to the statute of limitations; and as complainants' remedy at law is barred, it is also barred in equity. 2 Story's Equity, § 1520, note 2. More than six years had elapsed between the time of sale, January 2, 1843, and the time when the bill was filed, January, 19, 1849.

9. The reservation in the statute, in favor of *femes covert*, does not extend to a case of this kind. So far as these slaves were concerned, Mrs. Michan was a *feme sole*. The right of action which accrued to her on the sale of the slaves, was as perfect then, as it was when this suit was commenced. The proviso of the statute was only intended to reach those cases where the wife could not sue without joining her husband.

10. The defendant being an innocent purchaser, without notice, for a full consideration, and that paid, he will be protected by the statute of limitations, even if the property had been taken secretly, and fraudulently, and without her consent. Howell v. Hair, 15 Ala., 194; 1 Howard's U. S. R., 189. But in this case they were taken neither secretly nor fraudulently. She aided in sending them off; knew where they were all the time; knew that they were levied upon,

and were about to be sold; knew that they were sold, and to whom, her agent being present at the sale.

II. Upon the merits of the case, the superior equity is with the defendant:

1. Because he is an innocent purchaser, without notice. 2 Story's Equity, §§ 1502, 1503; 2 Vesey, 457; 1 Sumner, 507.

2. Because Mrs. Michan concealed her deed, and voluntarily aided in putting the property out of her possession; she was perfectly cognizant of all the facts attending the levy and sale, and yet did not make known to any one that she had a deed or claim of any kind. She was careful not to make it known, until after the sale had taken place, her husband's debts been paid, and the surplus of the proceeds drawn from the sheriff's hands by her consent. Upon this state of facts, this court will not come to her relief, to the prejudice of an innocent purchaser. Baker v. Rowan, 2 Stew. & P., 372; 1 Story's Equity, § 385; 7 Ala., 906; 1 Johns. Chan., 353; 6 Howard's U. S. R., 228; 6 Johns. Chan., 167; 8 B. Monroe, 547; Sugden on Vendors, 299.

3. The testimony of Goree shows, that Wyatt was not a mere speculator, a heedless purchaser; that he made diligent inquiry about the title, and was told by Goree that it was good, and that he would himself purchase if he had the money. He used due caution, and paid a full consideration.

4. It is manifest from the whole case, that Mrs. Michan has been guilty either of a fraudulent concealment of her deed, or of gross and culpable negligence; and in either case she will not be protected, at the expense of one who has been injured by her fraud or negligence. 2 Stew. & P., 372; Morris v. Moore & Hancock, 11 Humph., 434; Storrs v. Baker, 6 Johns., Ch., 167.

5. The drawing of the balance of the money from the hands of the sheriff by Mrs. Michan's consent, was a ratification of the sale, or at least shows her fraudulent intent in letting the negroes be sold, for the purpose of paying the husband's debts, getting the balance of the money, and then suing for the property.

LIGON, J.—The Chancellor having overruled the demurrer, and no cross assignment of error being found in the

record, the case must be here considered as though no demurrer had ever been interposed.

The case, then, is this: John Michan and wife file their bill against the defendant, for the recovery of property to which the wife alone is entitled, as her separate estate. Neither the allegations nor prayer assert a right in, or seek relief for the husband, in respect to the subject matter in controversy. The wife's interest alone is propounded, and the relief sought is for her protection and benefit. The answer denies her right, and that of her husband, to the slaves in controversy, as well as the right of either to the relief sought.

The proof shows, that the slaves were loaned by deed to the wife for life, to her sole and separate use, and at her death they were to vest in her children; that the slaves went into the possession of the wife, she being a *feme covert* at the time, and continued in the possession of husband and wife for more than twenty years, when they were levied on and sold as the property of the husband, and were purchased by one Williams, who sold them to the defendant for a valuable consideration.

At the hearing, the wife moved the court for leave to amend her bill, by striking out the name of the husband as complainant, and inserting that of some responsible person as next friend, and to make the husband a defendant. This motion was disallowed by the court.

The rule is, that a bill filed by husband and wife is generally to be taken as the bill of the husband. 1 Danl. Ch. Pr. and Pl., 350; 17 Ala., 201; 5 Paige, 581. But if the bill shows, on its face, that it is filed in respect alone to the wife's separate estate, and the defendant suffers the case to go on to final hearing, without taking exception to it, by demurrer for misjoinder of complainants, or by way of plea in his answer, he can then claim no advantage from it as a matter of right. On this subject Mr. Justice Story very justly remarks: "It is not safe, in any case, to rely on the mere misjoinder of parties as an objection at the hearing; for if the court can make a decree at the hearing, which will do entire justice to all the parties, and not prejudice their rights, notwithstanding the misjoinder, it will not then allow the objection to prevail." Story's Eq. Pl., § 237.

The rule which allows bills of this kind to be altered in their form and structure at the hearing, or on demurrer, is intended for the protection of the defendant; and its aid, in all the cases which I have examined, has been invoked by him. For if the bill is so constructed as to show that the husband claims an interest in the thing in controversy, and it turns out that he has none, but that the controversy concerns only the separate estate of the wife, a decree on such a bill, although it be for the defendant, will not conclude the wife, or offer the slightest impediment to her assertion of her rights by her next friend. I can see no reason, however, which will prevent the wife in such cases, if she apply in time, from asking for leave to amend her bill, so as to be able to present her case to the court fully and fairly, under the rules of practice, so that she too may be enabled to have her rights passed upon, and, (if she be entitled to it,) the relief she seeks granted to her. Yet her application for this purpose, when made at the hearing, must be subjected to the same rules, so far as they relate to the discretion of the Chancellor, that would govern it if made by the defendant.

All the authorities, so far as I have had opportunity of examining them, agree, that it is at the discretion of the Chancellor, when leave thus to amend the pleadings is asked for the first time at the hearing, to grant or refuse it. This being the case, his action on such a motion is not revisable on error. Story's Eq. Pl., § 63, and notes; 1 Danl. Ch. Pr. and Pl., 350; Bowie v. Minter, 2 Ala., 406; Boykin v. Ciples, 2 Hill's Ch. Rep., (S. C.,) 200; Kenny v. Udall, 5 Johns. Ch. Rep., 473; 2 Barb. Sup. Ct. Rep., 493; Bein v. Heath, 6 How. U. S. Rep., 239.

These authorities show conclusively, that, whether in this instance the refusal of the Chancellor to allow the amendment moved for by the complainant, Leah Michan, was a proper exercise of the discretion given by the law, or not, his action in this respect cannot be revised on writ of error.

But the question arises, was there such a misjoinder of parties complainant in this case, as to authorize a dismissal of the bill, on a final hearing, for that cause alone. It is well settled, that the misjoinder which will authorize this course must be of complainants whose interests are so diverse that

the Chancellor cannot include them in one decree, or, at least, must differ so widely as materially to affect the propriety of the decree.

Is this the case here? John Michan, the husband, sets up no claim in the bill, either to the slaves or their hire. He asserts only his wife's title, and exhibits with the bill itself a deed, as the evidence of that title, which, on its face, shows the slaves to be the separate estate of the wife, and expressly negatives any right in him whatever. The prayer of the bill, too, forbids the conclusion that it is filed to assert an interest in the husband; for it seeks only the restoration of the slaves to the possession of the wife, an account of hire for the time they have been adversely held, and the appointment of a trustee to hold and manage the slaves for her. Had the bill been filed by the wife, through her next friend, its allegations and prayer must have been the same, without addition or diminution. It is not then, in any proper sense of that term, the bill of the husband. Neither does it seek to divest him of any right, or deprive him of any interest, which renders it indispensable to make him a defendant. Nor is his position as complainant at all inconsistent with his rights and duties in another capacity, in which the law regards him as acting in respect to these slaves, which are clearly shown to be her separate property by the deed from her mother to Mrs. Michan. It is a well settled rule, that, where a deed creates a separate estate in the wife, and appoints no trustee to hold for her, and none has been appointed by a court of competent authority, the husband is the trustee, and in this capacity may protect, and, indeed, by every principle of legal and moral duty, is bound to protect the separate property of the wife, against wrongs and injuries from strangers. He would be recreant to every duty which the law imposes on him as trustee, if, when it was wrongfully or illegally taken away from his possession by a stranger, he did not use all legal means to recover and restore it. The deed in this case appoints no trustee, nor does it appear that one has been appointed by any competent authority. John Michan then, in this proceeding, may be regarded as the trustee for his wife, and in this capacity he has a standing with her in a court of chancery.

This is no new view of the rights of parties situated as these are; and it is so consistent with our views of the rights and duties springing out of the relations existing between them, that we willingly adopt it.

As early as 1752, the Lord Chancellor (Hardwicke) in the case of Griffith v. Hood, 2 Ves. Sr., 451, said: "Where there is any thing for the separate use of a wife, a bill ought to be brought by her *prochein amy* for her; otherwise it is her husband's bill. However, there have been cases of such a bill by the husband and wife, and the court has taken care of the wife, and ordered payment to some person for her;" and he retained the bill in that case.

In Boykin & wife v. Ciples et al., 2 Hill's Ch. Rep., (S. C.) 200, the facts were substantially these. One John Adamson, the father of Mrs. Boykin, Mrs. Ciples and Mrs. Delesseline, made his will, by which he gave to each of his daughters twenty-six slaves "during their natural lives, alone, and to their sole and separate use, without being in any manner subject to the debts, contracts, or forfeitures of their husbands, and to the heirs of their respective bodies, who may be living at their respective deaths. In case either of my daughters should die without leaving heirs of her body, her share shall go to the other or others of them, subject to the same terms and limitations as her or their bank shares." The bank shares were, in the event of a failure of issue with all the daughters, limited to certain grandsons named in the will. After the death of the testator, the husbands of the three ladies, in order to cut off the limitation in favor of their several wives and children in the portion of the sister or sisters who might die without issue, executed releases to each other; and in consideration that each had so released to the other, and for the further consideration of one dollar, each covenanted with the other, that neither themselves, their wives, nor the issue of their wives begotten by them, should ever set up any claim to the portion of the sister so dying without issue.

Mrs. Delesseline died without issue, and Boykin and wife filed their bill for the portion of the legacy of Mrs. Delesseline to which Mrs. Boykin was entitled, by the terms of her father's will, and claimed it as the separate estate of Mrs. B. Ciples and wife and Delesseline were made defendants, and

set up the release made by Boykin in bar of the suit. The Chancellor disregarded the form of the bill, disallowed the release as a defence against the wife's claim, and decreed partition. The case was taken to the Court of Appeals. Harper, J. in delivering the opinion of that court, said: "The only question necessary to be considered is, whether a married woman may sustain a suit for her separate property, her husband being joined in the bill. If she may, she certainly cannot be estopped by her husband's deed made in his individual capacity. When property is settled to the separate use of a married woman, and no trustee is appointed, it is a known rule of the court that the husband shall be made a trustee. Being a trustee, it should seem that he was a necessary party to the suit for the trust property, and being liable for costs, that any other *prochein amy* was unnecessary." And after citing Pawlett v. Delaval, 2 Vesey Sr., 663, in which Lord Hardwicke said, "if a bill be brought by husband and wife, for the wife's property, it is the bill of the husband," he justly remarks, that, "in that case, for aught that appears, the suit was for the benefit of the husband;" he cites Griffith v. Hood, *supra*, in which it is said, the decree must be for the wife, and a trustee appointed, and proceeds: "This is, I suppose, what we are bound to do if the bill be sustained. A husband, from necessity, is construed to be the trustee of his wife, but he is not the proper trustee. In general, the office of a trustee is to protect the property against the husband." The decree of the Chancellor was affirmed, and a trustee was appointed.

In Stuart v. Kissam, 2 Barb. Sup. Ct. Rep., 492, the bill was in the name of the husband and wife, against the trustee of the wife, to make him account with respect to the management of the wife's separate estate. It was objected at the hearing, that there was a misjoinder of parties; and it was attempted to be shown by proof, that the husband had made admissions and done acts with regard to the subject matter of the suit, which would bar a recovery on his part. The objection to the form of the bill was disallowed; and as it was a matter resting in the sound discretion of the Chancellor, the Supreme Court refused to review its exercise, retained the case as the suit of the wife, rejected the testimony offered to

prove the declarations and acts of the husband, injurious to the rights and interests of the wife, and proceeded to decree in her favor.

In considering the position which the husband sustained to the suit, the court say: "The husband is merely a formal party. He has no interest in the subject matter of the suit, and claims none; no relief is sought by, or can be decreed to him. He is joined plaintiff in this case, because the forms of our law do not permit a married woman to institute a suit in her own name, alone. Either her husband must join, or she must sue by her next friend. Where the suit relates to the wife's separate estate, in which the husband has no interest, and he is joned as plaintiff, his relation to the suit is very similar, if not precisely analogous, to that of a next friend. The whole subject matter of this suit belongs to the wife. She complains that her trustee has dealt improperly with her property. It is no answer for him to say, that her husband, who has no interest in such property, no right to interfere with it any way, no power to bind or affect her interests in respect to it, consented to the breach of trust."

To the same effect is the case of Berry v. Williamson and wife et al., 11 B. Monroe, 245, and Bein et al. v. Heath, 6 How. U. S. Rep., 228. In the latter case, the form of the bill is identical with the one we are now considering, and sought to set aside a mortgage made by the wife, in which her separate estate was charged with the payment of a debt originally contracted by the husband, but as a security for which the wife had made her own notes and a mortgage on her separate estate. The bill sought no relief for the husband, and contained no allegation except such as were necessary to propound the interest of the wife. The Supreme Court of the United States say, in the opinion: "It is objected, that, the suit being brought in the name of husband and wife, it must be considered as the suit of the husband, and that a decree will not bind the wife.

On looking into the bill it appears, that the name of the husband is used only as the *prochein amy* of the wife. He asks no relief. The wife prays an injunction against the sale of the mortgage property, and a rescission of the mortgage and notes, and a release from all liability."

To these cases, if it were necessary, others could be added, but I deem it unnecessary. They are sufficient to establish the rule, that, where the bill is, in form, the bill of husband and wife, yet, in substance and in fact, it only concerns the separate property of the wife, and seeks alone to establish her rights, and protect her interests, without seeking relief against the husband, he will be regarded only as her next friend or trustee, and a decree rendered in it will be conclusive on the wife. But if the bill seeks relief, either for or against the husband, the Chancellor should order it to stand over, until it could be reconstructed, so as to interpose a next friend to prosecute for the wife, and make the husband a defendant; and this, whether the objection be made by demurrer, plea, answer, or for the first time at the hearing; but in the latter case, it is left to the sound discretion of the Chancellor whether he will allow it to be done, or dismiss the bill without prejudice to the wife. In this view of the case, it was proper for the Chancellor to dispose of the case upon its merits, and under the assignment of errors, it becomes our duty to pronounce whether he erred in the decree rendered by him.

Before, however, I proceed to this, it may be well to remark, that there is no conflict between the ruling in this case and in that of Hamilton and wife v. Clemens, 17 A. R. 201, although there is a seeming one. I well remember the facts of that case, having decided it in the court below. They are wholly dissimilar from those of this case. In that case, the bill was filed for the purpose of asserting a resulting trust in favor of Mrs. Hamilton, in certain slaves held by the defendant, and the court was asked to declare and establish it for the benefit of both husband and wife. It was not pretended that this trust had been created for the sole and separate use of the wife. The husband sought a personal benefit by the bill, and joined with the wife in its allegations and prayer. It sought relief for him, deducing his claim through his wife. A release of his interest in the property sought to be recovered, made before the filing of the bill, and apparently on a good consideration, was pleaded by the defendant; and the bill was dismissed, but without prejudice to the rights of the wife. Here, the husband, as has been before remarked, as-

serts no interest in himself, seeks no benefit, and asks no relief. He is a mere nominal party, standing here because the wife's rights have been invaded, and by the rules and policy of our law, she cannot sue alone, and he, from necessity, is her trustee. In that case, it was in form and substance the bill of the husband; in this, it is substantially the bill of the wife.

On the hearing, a transcript of the record of the proceedings, judgment and execution in the Circuit Court of Cherokee county, in the case of Crawford v. John Michan, was offered in evidence by the defendant. To the introduction of this the complainant objected, but his objection was overruled by the Chancellor, and the evidence received. In this, we think, the Chancellor clearly erred. This suit is the suit of Leah Michan, and not that of her husband; although he is a party to the record, yet he is only nominally so. He has no interest; the whole interest is in the wife. So far as she is concerned, this transcript is *res inter alios*, and is incompetent evidence. Neither a judgment against the husband, his declarations, or his deed of release, would be receivable, as they would be wholly irrelevant to the issue made by the pleadings. This issue is, are the slaves in controversy the separate estate of the wife? Every thing that would legitimately tend to prove or disprove this, is relevant. The record offered does not connect itself even remotely with this proposition, and, consequently, should have been excluded.

It was not denied that the deed from Nancy Renwick to Mrs. Michan, invested the latter with a separate estate in the slaves. Has this estate ever been legally divested, or has she done any thing which will estop, or hinder her from setting up her title against the defendant in a court of equity? I have examined the evidence carefully, and if it establishes one fact with greater clearness and certainty than any other, it is, that Mrs. Michan never intended to part with her separate interest in these slaves, nor to allow them to be sold for the payment of her husband's debts. To prevent the latter, when she was told by a friend that it was threatened by the sheriff of Cherokee county, who had an execution in his hands against her husband, she consents to send them off to a distant county, and to take on herself the menial offices

and drudgery of the household. Hearing that their place of concealment had been discovered by her husband's creditors, she sends her son and another, and bids them hurry to change their location, and insure their safety from the officers of the law. And when, at last, they were hunted up and sold, and it was ascertained that they had brought an amount exceeding the debt for the satisfaction of which they were sold, she does not join her husband in collecting this surplus from the sheriff, but, in the language of one of the witnesses, she says: "We would like to have the money, but I will do nothing to prejudice my claim to the negroes." Even her necessities could not wring from her an abandonment of her claim.

The Chancellor predicates his decree, in a great measure, upon the supposition, that Mrs. Michan knew of, and consented to the sale of the slaves by the sheriff of Sumter county, and that she did so for the fraudulent purpose of procuring her husband's debts to be paid by a sale of the slaves, and then intending to set up her own claim against the purchaser. The proof does not warrant such a presumption; and it is a well established rule, that fraud will never be presumed; it may be inferred, when facts are clearly proved to justify the inference, but this is not the case here.

The Chancellor, however, predicates his assumption upon the supposed presence of her son, James H. Michan, at the sale of the slaves, and the further assumption, that he was the agent of his mother with full power to dispose of the slaves. Waiving the question, whether, under the deed, Mrs. Michan could herself make a valid disposition of her interest in the slaves, without the interposition of a trustee regularly appointed, and the sanction of a court of equity; it is sufficient for the purposes of this case to say, that the power given to James H. Michan by his mother, as shown by the proof, extended to the removal and hiring of the slaves, and no further. This was the extent of his power, and it cannot be tortured into an authority to sell, or otherwise to embarrass or intermeddle with the title to the property. Again; the proof is wholly silent, as to the presence of James H. Michan at the sale by the sheriff of Sumter.

It is insisted, however, that to give it validity, the deed

from Nancy Renwick to Leah Michan should have been recorded in this State. There is no necessity for this, as has been repeatedly decided by this court. It is no incumbrance on the title within the meaning of our act of assembly, but is the evidence of the title itself, held by the loanee of the slaves, who has had them in possession under it for more than twenty years. The husband does not claim any interest in them whatever; and the mere fact that the donee is a married woman, living with her husband, cannot affect her right. In such cases the possession will be referred to the title, and the husband will be regarded as the trustee for the wife. Hale v. Stone, 14 A. R. 803; O'Neil v. Teague, 8 A. R. 345; Newman v. James, 12 A. R. 29; Smith v. Ruddle, 15 A. R. 28.

It is, however, contended, that, as the defendant is a *bona fide* purchaser for valuable consideration without notice, the complainant is barred by lapse of time, and the statute of limitations, from setting up her claim against him.

Such is not my view of the law. The complainant here is a married woman, and was such when she acquired her right to this property, and when it was wrongfully sold for the payment of the debts of her husband. This being the case, she is within the saving clause of our statute of limitations, and that expressly excepts her from the operation of the statute.

There is no difference, in respect to this point, between the case under consideration and that of Sledge's Adm'rx et al. v. Clopton, 6 Ala. 589; and the same rule must govern it. In that case, the husband had borrowed money, and pledged slaves to the lender as a security for its payment; but made with him an agreement, that, if the wife of the borrower should repay the money, the slaves should be settled on her as her separate estate. The wife tendered the money, but the lender refused either to receive it, or make the settlement. This took place in 1830 or '31. The husband died in 1836, and the bill was filed in December, 1841, nearly six years after his death. The statute of limitations, as well as the staleness of the demand, was relied on in defence of the bill. The court repudiated both, and after reciting the statute of limitations, (Clay's Dig. 326 § 78, and 327 § 80,) go on to say, with regard to the former: "The case at bar is more like the action of detinue than any other form of action at law; and consequently, if

either of our statutes of limitations be applicable to it, it is the one cited. But the proviso of this act declares, that it shall not operate against a *feme covert;* and there is, therefore, no pretence for supposing that the statute began to run against the complainant previous to the death of the husband."

This same statute, (the act of 1802,) or rather the proviso to it, passed in review before the Court of Errors and Appeals of Mississippi, and received a similar construction, in the case of Curll v. Compton, 14 Smedes & Mar. 56, and the same result was attained as in Sledge's Adm'r v. Clopton, *supra.*

The coverture of Mrs. Michan still exists, and consequently the defendant will not be allowed to set up the statute of limitations against her.

From what has been said, it is evident, that the court below erred in dismissing the bill. It should have decreed for the complainants, and directed the master to report a suitable person to act as trustee for Mrs. Michan, to whom the defendant should be required, by peremptory order, to deliver the slaves, and the increase of the females among them. The master should have been also directed to state an account for hire during the time the defendant has had possession of the slaves, calculating interest on such hire from the end of each year until the time of such accounting; as well as to ascertain if any of those bought by the defendant of Williams have died since demand made, or the filing of the bill, and if so, to ascertain and report the value of such as have died. For the sums arising from the hire of the slaves, and the value of those which have died since the filing of the bill, or demand made by complainant, as above stated, he should have rendered a money decree against the defendant.

We should not hesitate to render such decree here, but we are without the necessary data. The decree of the Chancellor is reversed, at the costs of the defendant in error, and the cause remanded, that it may be proceeded in according to the foregoing directions.

WARE ET AL *vs.* JORDAN, ADM'R.

1. When a bill charges the confession of a judgment by one defendant to another to have been made for the purpose of hindering, delaying and defrauding the creditors of the former, but makes no charge and asks no discovery touching the consideration of the judgment, an allegation in the answer that the judgment was confessed for a pre-existing, *bona fide* debt, is not responsive to the bill. (*Per* Parsons J., Dargan C. J. *dissenting*, Chilton J. *not sitting.*)
2. A defendant who is individually, or with others, directly liable for costs in a cause, is not a competent witness to prove any fact which would relieve him from those costs.

ERROR to the Chancery Court of Talladega.

Heard before the Hon. DAVID G. LIGON.

The original bill in this case was filed in September, 1845, by Jordan, the defendant in error, as administrator of Samuel Dillard, against Bennett Ware and others. It alleges, that, in February, 1837, Dillard, Ware and one McRae became co-sureties for one Richard Whitworth, on a note for $2182 50; that judgment was rendered on said note against all the parties to it, but not in the same court; that a family of negroes were sold, under execution issued on said judgment, as the property of Whitworth, and the proceeds of the sale applied to the part satisfaction of the judgment; that complainant, as the administrator of Dillard, was compelled to pay the balance of said judgment, amounting to more than $2000; that Whitworth had died, insolvent; that McRae was insolvent, and that Bennett Ware was also insolvent, except as thereinafter stated; that Bennett Ware had obtained a decree in said Chancery Court against Malcolm Smith and others, who are made defendants to the bill, for upwards of $3000.

The bill prays an injunction, to restrain the collection of said decree by the defendant Ware, and seeks its condemnation to the satisfaction of complainant's claim for contribution. Bennet Ware answers, admitting the execution of the note, the recovery of judgment thereon, and the rendition of the decree in his favor in said Chancery Court. He states, that, before the filing of the bill, he had transferred said decree to his solicitor, Wm. P. Chilton, except the sum of $2100, as

his fee for professional services rendered in obtaining it; that he had drawn an order on said Chilton, in favor of one E. H. Avery, for the amount of a judgment which said Avery had recovered against respondent and R. H. Ware, amounting to $1000, to be paid out of said sum of $2100; and that he had directed Chilton to pay the residue of said sum in his hands to said R. H. Ware, to whom respondent had confessed a judgment for a much larger amount.

E. H. Avery and R. H. Ware filed their petitions, propounding their interest in the fund, and asking to be made parties.

An amended and supplemental bill was afterwards filed, which charges that said judgment in favor of E. H. Avery v. R. H. Ware and Bennett Ware, and said judgment in favor of R. H. Ware v. Bennett Ware, were confessed for the purpose of hindering, delaying and defrauding creditors; that several judgments had previously been rendered against Bennett Ware, and that several suits were then pending against him, which afterwards matured into judgments. Other facts are also alleged, tending to show the embarrassed circumstances of Bennett Ware and R. H. Ware. Avery, R. H. Ware and Chilton, together with the original defendants, are made defendants to this bill, and are required to answer specifically all its allegations.

Avery and R. H. Ware allege in their answer, that said judgments were confessed for pre-existing, *bona fide* debts, due from the defendants in each case to the plaintiffs, and without fraud, collusion or any intention whatever to hinder, delay or defraud creditors. Chilton also answered, asserting his lien upon the fund for professional services.

The deposition of Bennett Ware was taken by the defendants, E. H. Avery and R. H. Ware, to prove the assignment of said decree to Chilton, and the *bona fides* of said confessed judgments. The deposition was objected to by the complainant, and excluded by the Chancellor, on the ground that said witness was liable for costs, he being a defendant to the bill, and implicated in the fraud charged.

The Chancellor dismissed the bill as to Chilton, allowing his lien upon the fund, and condemned the residue of the fund to the satisfaction of the complainant's demand; and

this decree is now assigned for error, together with the exclusion of the deposition of Bennett Ware.

RICE & MORGAN, for plaintiffs in error.

WHITE & PARSONS, *contra*.

PARSONS, J.—We think it is not material whether Bennett Ware was a competent witness or not. Two of the defendants below, E. H. Avery and R. H. Ware, here complain that, as to them, there was error in the Chancellor's decree. There is no question but that the assignment to Mr. Chilton, for his own benefit and the benefit of E. H. Avery and R. H. Ware, was supported by a good consideration, and *bona fide*, as far as Mr. Chilton is concerned. If there is any consideration for the assignment, beyond the extent of Mr. Chilton's interest in it, that consideration consists of the judgment which Bennett Ware and R. H. Ware confessed in favor of Avery, and of the judgment which Bennett Ware confessed in favor of R. H. Ware. The bill does not controvert the fact of the assignment, or of the two judgments; but it states, that the parties intended thereby to defraud the creditors of Bennett Ware, of whom the complainant is one. Avery and R. H. Ware, by their answers, expressly and fully deny this allegation of the complainant. They state, that their judgments were confessed, by Bennett Ware and R. H. Ware in the one case, and by Bennett Ware in the other, upon actual debts. These answers, being directly responsive to what was charged by the complainant, must, according to the general rule, be taken as evidence of the facts which they aver. As the judgments were confessed, they are not sufficient evidence of the debts; but we think the answers are, Smith et al. v. Rogers & Sons, 1 Stew. & P. 317. As the indebtedness of Bennett Ware to Mr. Chilton and to Avery and R. H. Ware constituted a full consideration for the assignment, we cannot see, upon the bills, answers and evidence, why it should not have been sustained entirely.

The amended and supplemental bill states the relations between the two Wares, and between them and Avery, and the embarrassed circumstances of the two Wares, as signs of fraud. These are admitted by the answers; but it cannot be

contended that they can prevail over positive evidence, such as we think the answers are. It is stated in the bills, that R. H. Ware was young, and lived with his father, &c. But we think that his answer is reasonably satisfactory upon these points. The bills state other circumstances of actual fraud, among the two Wares and Avery; but they are denied, and are not proved.

Let the decree be reversed, so far as it is inconsistent with this opinion, and the cause remanded.

NOTE.—A rehearing was granted in this case, and the following opinion was afterwards delivered:

PARSONS, J.—My first opinion was, that the answers of Avery and R. H. Ware were responsive, and therefore evidence of the debts upon which the judgments were confessed by Bennett Ware; but my final opinion is, that they were not responsive in respect of those debts, but in avoidance as to them, and that the burthen of proving them by competent evidence was upon Avery and R. H. Ware.

The Chief Justice and myself sit alone in this case; but he does not concur in my present opinion: he thinks my first opinion was right. Upon this division of the court, the decree of the Chancellor is affirmed; because the Chief Justice fully concurs in the next branch of this opinion.

The next question relates to the competency of Bennett Ware, who was a co-defendant, as a witness, to prove the debts upon which the judgments were confessed. This question, in effect, was raised for the decision of this court, in Borland v. Walker et al. 7 Ala. 269; but it was not decided, because it was found to be unnecessary to do so. The counsel for the plaintiffs in error have referred us to various other decisions of this court; but I do not think they are in point. At law, it is settled that, if a witness would be liable in one event to the costs of the action, then, without a release, which will annul his interest in the event, he will not be admissible as a witness on the side of the party in whose favor he is interested. 1 Greenleaf on Evidence §§ 401, 402, and authorities there cited. It may, I think, be collected from the cases generally, that a witness, whether at

law or in equity, who is under a direct liability for costs, in one event of the cause, is not competent on the side of his interest.

The case of Eade v. Lingood, 1 Atk. 204, is in point. A bill was brought against Thomas Lingood, charging a fraud against him, in pretending to have bought a copy-hold estate with the money of his daughters, when it was in fact his own money. His daughters were made defendants in the cause, in order to reconvey the copy-hold to their father's assignees in bankruptcy. The counsel for the daughters, in excuse of their costs, offered to read the deposition of the defendant, Thomas Lingood, to show that he had led them into the mistake, by informing them that the purchase was made with their money. Lord Hardwicke refused to let Thomas Lingood's deposition be read, "because, where one defendant is charged by the bill with a fraud, his deposition cannot be read for another defendant, as it will be an advantage to himself, and may tend to excuse him with regard to his own costs."

In Barret v. Gore et al. 3 Atk. 401, the bill was filed against Gore for the specific performance of an agreement between Barret and Gore, which was drawn by Humfreville, as an attorney, and had been deposited with him by the parties. Humfreville subsequently refused to give Barret a copy of the agreement, alleging that his fees had not been paid, &c.; but in breach of his trust, delivered it up to Gore. For this, Humfreville was made a co-defendant to the bill. Gore, at the hearing, offered to read the deposition of Humfreville, to prove it a conditional agreement only, and for other purposes. But Lord Hardwicke held, that, if a person would act in such manner as to make himself a proper party to the cause, and liable *prima facie* for the costs, though he was the only person present at the agreement, yet the rule must prevail against his deposition's being read as evidence; and his Lordship determined accordingly.

In the present case, it is not necessary to go so far. For the purpose of this case, the rule may be laid down more guardedly—that a co-defendant, who is individually, or with others, directly liable for costs in the cause, is not competent as a witness, to prove any fact which would relieve him from

those costs. According to this, Bennett Ware was properly excluded by the Chancellor. The complainant filed his bill against Bennett Ware, for contribution as a co-surety, and prayed all the relief to which his case entitled him. He made Avery and R. H. Ware co-defendants, because, as the complainant charges, Bennett Ware, to defraud his creditors, had assigned to their use a fund to which his creditors were entitled, he having become insolvent. Now, so far as the bill sought a decree for contribution, Bennett Ware alone was liable for costs, and so far Avery and R. H. Ware were not liable; and so far as the bill sought to set aside the assignment, on the ground of fraud, all the parties to the fraud were liable for the costs. The parties to the alleged fraud were, Bennett Ware, R. H. Ware and Avery; and if it should be established, (which was the case, but for Bennett Ware's deposition,) they were all directly liable for the costs of the cause, so far as it involved the question of fraud. Was Bennett Ware, in this predicament, a competent witness to disprove the fraud? We think he was not.

The English rule, as held by Lord Hardwicke, it seems, has not been adopted, or not strictly adhered to, in New York. See Donald v. Nielson, 2 Cowen's R. 139, and cases cited; and the court thought it had been shaken in England, and cited Man v. Ward, 2 Atk. 228; Cotton v. Luttrell, 1 Atk. 451; Fenton v. Hughes, 7 Ves. 287; Duncan v. Corporation of Chippenham, 14 Ves. 251; Whitworth v. Davis, 1 Ves. & Bea. 548, 551. I have looked into all these cases, and am of the opinion that they can be reconciled with the case of Barret v. Gore and Humfreville; or at least, that they are consistent with what we have held in this case. Some of them were decided by Lord Hardwicke himself, before he decided the case of Barret v. Gore and Humfreville.

The counsel for the plaintiffs in error argued other questions, which we have attentively considered; but our opinion is, that there is no error in the record, in respect of Bennett Ware's competency. The decree is affirmed.

NOTE.—This opinion was delivered at the June term, 1851, but the reporter was instructed that it was unnecessary to publish it. It is now published at the request of the counsel who were engaged in the case. REPORTER.

APPENDIX.

NOTE.—In the case of Atwood's Heirs v. Beck, Adm'r, page 590, S. F. RICE, Esq., who was of counsel for the legatees Alexander and Ann, argued the case for the defendant in error, in favor of the validity of the bequests. The brief of his argument which he submitted did not come to the reporter's hands in time for insertion at the proper place. It is here subjoined:

1. If it is conceded that our law and policy forbid the manumission of slaves, *to reside among us*, yet they do not forbid the removal of them, *bona fide*, to a free State, in order to reside there as free persons. Cameron v. Commissioners of Raleigh, 1 Iredell's Eq. R. 436; Frazier v. Frazier, 2 Hill's Ch. 316.

2. The owner of property is free to relinquish his right to it; and the manner of his relinquishment must be left to his own discretion, if there are no legal restraints. What are the reasons or object of the restraints imposed upon this natural right in Alabama? It certainly is not the protection of the citizens of a free State,—of Ohio, for instance,—but the protection of the citizens of Alabama, and their interest, by throwing suitable guards around the institution of slavery *within the State*, and by guarding our citizens from the burthen and charge of black paupers, and against the demoralizing tendency of a policy which would allow emancipation in our midst, among our own slaves and our own homes, at the mere volition of the master. Trotter v. Blocker, 6 Por. 269. But where the slave has already been sent into a free State, and is never to return to a slave State; where, afterwards the former owner, by his will, shows that he had selected that as "the manner of relinquishment" of his right to the slave; and where, by such will, such previous relinquishment of his

right is confirmed, and a legacy is given to the emancipated slave,—there is nothing, either in the laws or policy of Alabama, which requires the courts to pronounce such relinquishment of right to the slave, or such legacy to the emancipated slave, void. A bequest of property to a slave, in a will bequeathing him his freedom, has been held valid. Ford v. Ford, 7 Humph. 96; Henry v. Hogan, 4 ib. 205; Commonwealth v. Aves, 18 Pick. 193; McCutchen v. Marshall, 8 Peters 220.

3. This case is clearly distinguishable from all such cases as that of Hinds v. Brazeale, 2 Howard's Miss. R. 837, where the pretended emancipation was planned and executed by a citizen of a slave State, with a fixed design to evade the laws of that State, and where the removal of the slaves from that State to a free State was only temporary and colorable, and was immediately followed by the return of the master, with his slaves, to such slave State. In the present case, there is no act done in violation or fraud of our law; no temporary removal of Alexander and Ann from Alabama to Ohio, with a design to evade our laws. But many years before the testator's death, and before the will was written, he relinquishes his ownership and right to them, and manifests it by sending them to Ohio, to reside there as free persons, and never to return to any slave State; and by his will, he confirms this relinquishment, they remaining in Ohio as free persons, and gives each of them a legacy. The laws and policy of Alabama do not, under these circumstances, require that they should be regarded and treated as slaves now, and as incapable of taking the legacies provided for them in the will.

4. The voluntary removal of Alexander and Ann, by the testator, from Alabama to Ohio, with the intention and purpose shown by the will, and plainly inferable from it, and there leaving them under the protection of the laws which declared them free, was, in law, a relinquishment by the master of his right to these slaves, and made them free; or, it may be safely stated, that, they being in Ohio by the voluntary act and consent of their master, he had the right to bequeath to them by will their freedom, they remaining always out of every slave State. 18 Pick. 193; 8 Peters 220.

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2. Although an *ex parte* survey, made by a county surveyor without an order of court, may not within itself be evidence, yet the surveyor may be examined personally to prove the boundaries of the land, and may illustrate his evidence by his own survey; and when the surveyor, by his own testimony, has proved the accuracy of his survey, it may then go to the jury, as testimony tending to prove the locality of the land and its boundaries..... 66
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BOUNTY LANDS.

1. Land warrants, granted under the act of Congress, unless specifically devised, pass to the heirs at law.—Atwood's Heirs v. Beck, Adm'r..... 590
2. The proviso to the act of Congress of February 11, 1847, conferring bounty lands on soldiers, was intended to protect not only pre-emption claimants, but also those who had actually settled and cultivated the public lands, although they might not under the law be entitled to a pre-emption.—Cruise v. Riddle..... 791
3. But if this proviso of the act is disregarded, and the bounty land claimant obtains from the register a certificate for land which is actually settled and cultivated by another, the settler cannot defeat the title of the

claimant in an action of ejectment..... 791
4. *It seems*, that the settler's remedy is by application to the Government, to recall the certificate, or refuse the patent if it shall appear that it was wrongfully obtained..... 791

CERTIORARI.

1. A *certiorari*, to remove a cause from a justice's court into the Circuit Court, should not be dismissed because the petition does not set forth a sufficient reason for its issuance.—Van Eppes v. Smith..... 319
2. *Mandamus*, when directed to an inferior tribunal, is a writ which seeks to compel action; but it does not point out to that court how it shall act in a matter over which it has a discretionary power of decision. *Certiorari*, on the other hand, is a writ revisatory in its nature, and is issued for the purpose of enabling the superior court to correct the erroneous action of the inferior.—Lamar v. Commissioners' Court of Marshall County..... 772

CHANCERY.

1. A bill which alleges that the complainant had advanced money to one of the defendants, and also executed to him, for his accommodation and without consideration, a promissory note for a large amount, and had taken from him a deed to a house and lot, which was absolute on its face but intended as a mortgage for the security of the debt created by the loan of the money and the note, that said defendant had, without consideration, transferred said note to his co-defendant, who was cognizant of the facts attending its execution, and who afterwards recovered a judgment on it against complainant; and which asks, that the deed may be declared a mortgage, that the mortgage may be foreclosed, and that the judgment at law may be enjoined, is not wanting in equity, although its allegations as to complainant's failure to make his defence to the suit at law would not be sufficient to entitle him to relief against the judgment, if the bill were filed for that purpose only.—Bryan and McPhail v. Cowart..... 92
2. The grantee of a deed, which is absolute on its face, may come into a court of equity to have it declared a mortgage..... 92
3. An agreement that a deed absolute on its face should operate only as a mortgage, must be contemporaneous with the execution of the deed itself; otherwise, unless supported by some new consideration, it is *nudum pactum*, and no right can arise under it..... 92
4. When the settlement of an estate has been removed from the Court of Probate into the Court of Chancery, by a bill regularly filed, and the latter court has rightfully taken jurisdiction, and the defendant has answered the bill, and the cause is progressing in the equity forum, the administrator, pending such suit, proceeds in the Court of Probate at his peril, and is liable to have his acts reviewed; and any rights which he may acquire by reason of the action of the Court of Probate, may be divested by the Court of Chancery, if such rights in any wise conflict with, or embarrass the proper administration of the estate in equity.—Pearson v. Darrington, Adm'r..... 169
5. Where the settlement of an administration is withdrawn from the Orphans' Court, by a bill filed in the Court of Chancery, and the cause is progressing in the latter court, it is competent for that court, if the exigencies of the estate require it, to direct, by interlocutory decree, a sale

of the slaves belonging to the estate, for cash, at an unusual season of the year for selling such property, upon the petition of the administrators or of the creditors; and this, even before an accounting is had between the administrator and the complainants..... 169

6. And if, in such case, the administrator invokes the aid of the Orphans' Court, and obtains an order of sale, and purchases the slaves sold for himself, it is the duty of the Court of Chancery, to provide that the slaves so purchased by him shall be forthcoming to abide the final decree in the cause..... 169

7. If an administrator, pending a suit in equity for the settlement of the estate, pays demands against the estate, and seeks to indemnify himself, by selling the property, under an order of the Orphans' Court, and purchasing it himself; or, if he has extingnished demands by giving his individual obligations, which have been reduced to judgments, and he seeks, by a purchase of the property, to invest himself with the title, so as to make it subject to levy; in either event, the Court of Chancery will hold the property subject to its control, to abide whatever decision the justice and equity of the case may require to be made on the final hearing.... 169

8. A distributee's undivided interest in an unsettled estate may be set apart in equity by his judgment creditor, and subjected to the satisfaction of his demand.—Lang et al. v. Brown..... 179

9. But in order to do this, it is indispensably necessary that the Chancellor should proceed to make a final settlement of the administration, and separate the portion of the judgment debtor from the remainder of the estate before a final decree can be pronounced condemning such portion to the payment of the demand. To this end, the master should take just such an account of the affairs of the administration, as is required to be taken by the Court of Probate on the final settlement of intestate's estate; and when this is done, the Chancellor should direct the estate to be distributed among the parties in interest, in a manner as nearly conformable to that pointed out by the statute for the government of the Courts of Probate as is practicable, and then direct the sale of so much of the portion sought to be charged by the creditor as shall be sufficient to satisfy his demand..... 179

11. When a bill is filed by a creditor, to subject to the satisfaction of his judgment his debtor's undivided interest in her husband's estate, of which she is administratrix, and to set aside as fraudulent a deed conveying all her interest in the estate to her children, who were the other distributees, to which bill the widow, individually and as administratrix, and the other distributees are made parties defendant, a decree in favor of the complainant which directs "*the defendants*" to pay into court the amount of complainant's judgment, and execution to issue *against them* in default of payment, is erroneous..... 179

11. The second head-note in Brown v. Lang et al., (14 Ala. 719,) corrected. 179

12. A court of equity will not reform an instrument which speaks the true agreement between the parties, although they may have mistaken the legal consequences of the agreement.—Larkins et al. v. Biddle et al.... 252

13. But where the instrument does not express the agreement between the parties, from the ignorance or want of skill of the draftsman, or from any other cause, equity will reform it..... 252

14. A deed of gift drawn by the grantor himself, which, by reason of his

ignorance of the law, does not express his intention, may be reformed in equity..... 252

15. A conveyance executed by an insolvent to one of his creditors, absolute on its face, but accompanied by a contemporaneous parol agreement that it should operate only for the grantee's indemnity, is fraudulent and void as to the other creditors of the grantor, and will be set aside in equity. —Bryant v. Young, Hall et al..... 264

16. If the land has been sold by the grantee to a *bona fide* purchaser for a valuable consideration, who is not made a party to the bill filed by the creditors of the grantor, the land itself cannot be subjected to the complainants' demand..... 264

17. But the proceeds of the sale in the hands of the fraudulent grantee may be subjected, and so far as any portion of the same can be traced into other property purchased or exchanged by him, a court of equity will fasten a trust upon it in favor of the creditors..... 264

18. The fact that the fraudulent grantee was also a creditor of the grantor's, only proves that the transfer to him was upon a valuable consideration, but does not give him a superior equity to complainant's. Evidence of the fraudulent intent supersedes the whole inquiry into the consideration; for, no merit in any of the parties to a transaction can save it, if it carries intrinsically or extrinsically the evidence of fraud..... 264

19. The enforcement of the specific execution of a contract in a court of equity, is not a matter of right in either party, but a matter of sound, reasonable discretion in the court; and the court uniformly refuses to decree a specific performance, except in cases where such a decree would be strictly equitable.—Blackwilder v. Loveless..... 371

20. It requires much less strength of case to enable the defendant to resist a bill for the specific execution of a contract, than it does on the part of the plaintiff to maintain his bill; for, if the bargain be hard and unconscionable, or, if the specific execution of it would, under all the circumstances, be inequitable, the Chancellor should refuse to decree a specific execution, and should leave the parties to their remedy at law..... 371

21. Where the complainant, having recovered a judgment against defendant, in an action of unlawful detainer of certain lands in defendant's possession, worth $300, to which defendant claimed title, and on which he had a growing crop, and having a writ of restitution in the hands of the sheriff, procured defendant to enter into a contract, by which, in consideration of complainant's note for $30, and the retention of possession for the remainder of the year, a period of four months and a half, defendant promised to deliver up the land at the expiration of the year, and executed to complainant his bond for title, the specific execution of the contract was refused, and the bill dismissed at complainant's costs..... 371

22. A bill filed by an infant bastard by its next friend, alleging that the defendant was its father, and that he, to avoid the statutory liability for its support, had removed beyond the jurisdiction of the State, leaving property, out of which the bill prays that provision may be made for complainant's support, is without equity.—Simmons v. Bull..... 501

23. The fact that a mortgage contains a power of sale does not deprive a court of chancery of jurisdiction to foreclose.—Carradine v. O'Connor... 573

24. A bill filed by the *cestui que trust* to set aside a sale at which the trustee became the purchaser, is demurrable, if it does not contain an offer, or

what is equivalent to an offer, to do what is equitable, by the repayment to the trustee of the amount actually paid by him.—Gunn v. Brantley.. 633

25. But the bill is not demurrable on this ground, when it alleges that the rents and profits received by the trustee are sufficient to reimburse him for the amount paid by him, and the complainant offers, if they are not sufficient, "to abide the decree of the court."..... 633

26. The vendor is not a necessary party to a bill filed by one of his vendees against another, respecting transactions between them under a contract for the division of the land, when he has divested himself of all interest in the subject matter of the suit, by making title to the land to one of the vendees and taking up his bond for titles to the two jointly, and the complainant does not complain of his action in this respect.... 633

27. If objections to testimony are taken before the commissioner and are overruled by him, they must be regarded as waived, unless brought to the notice of the Chancellor by exceptions filed or motion to suppress... 633

28. In all cases of concurrent jurisdiction, statutes of limitation are equally as obligatory in courts of equity as in courts of common law; and in many cases, mere lapse of time and the staleness of the claim will constitute a defence in equity, when the statute does not apply..... 633

29. An answer contradicted in a material point loses its weight as evidence..... 633

30. If, through mistake, a written agreement contains substantially more or less than the parties to it intended; or, if, from ignorance or want of skill in the draftsman, the object and intention of the parties, as contemplated by the agreement, is not expressed in the written instrument, by reason of the use of inapt expressions, equity will interpose, upon clear and satisfactory proof of such mistake, and reform the instrument, so as to make it conformable to the true intent of the parties.—Trapp & Hill v. Moore & Border..... 693

31. But where the instrument speaks the true agreement between the parties, equity will not reform it because one or both of them may have mistaken its legal consequences..... 693

32. Where a debtor executed a deed of trust to secure certain of his creditors and sureties, and included in it certain notes on which one of the beneficiaries was supposed to be bound as surety, describing them as notes on which said beneficiary was security, under the belief that, if he was not bound, the misdescription would exclude the holder of them from any benefit under the deed, the deed was reformed in equity, upon proof of the mistake, and that the grantor intended to secure the said beneficiary only, and not the notes..... 693

CHANCERY PLEADING AND PRACTICE.

1. The proof must be clear and convincing, to enable the court to declare an absolute deed a mortgage. Loose declarations of a trust, especially after great lapse of time, will not be allowed to overturn or affect the written contract of the parties.—Bryan and McPhail v. Cowart..... 92

2. An answer which denies the allegations of the bill upon the knowledge of the respondent must prevail, unless it is disproved by the testimony of one witness with strong corroborating circumstances, or by two positive witnesses. These witnesses must not only be credible, but their opportunities of knowing the facts about which they depose must be ample..... 92

3. When the complainant seeks to have an absolute deed declared a mortgage, and does not examine the subscribing witnesses to the deed, to prove what transpired at the time of its execution, the fair presumption is, that their testimony would militate against him; and such failure casts a shade of suspicion on his cause, which will induce the court to regard with more jealousy, and examine with stricter scrutiny, the less convincing proof on which he relies..... 92
4. When the complainant fails to make out the only ground for relief which gives a court of equity jurisdiction of his case, his bill cannot be retained on account of other grounds of relief, even if the proof sustains them.. 92
5. When a reference is made to the master, and he disregards the instructions and directions of the Chancellor, or does not furnish in his report the facts necessary to enable the court to proceed to a final decree on the merits of the case, the report should be set aside, even if no exceptions are taken to it.—Lang et al. v. Brown..... 179
6. It is the duty of the master to obey the instructions of the Chancellor; and if it is desired that the Chancellor should review his directions, the party supposing himself to be aggrieved by this obedience of the master, may take exceptions, and by this means bring the point again to the attention of the Chancellor. If, on the argument of these exceptions, it should be made to appear that the justice of the case cannot be got at, without an alteration of the decree, in conformity with which the report is made, the Chancellor should direct the report to stand over, and order that portion of the decree containing the erroneous directions to be reheard..... 179
7. It is not competent for the court, upon exceptions, to make an order inconsistent with the decree; from the time the decree is pronounced, all the subsequent proceedings should be consistent with it..... 179
8. When the report of the master is in direct opposition to the original decree, an order of the Chancellor confirming it, may be reviewed in the Appellate Court, without exceptions to the report in the court below... 179
9. Where the general right claimed by the bill is the same as to all the defendants, an objection for multifariousness, on the ground that the defendants have distinct and separate interests, cannot be sustained.—Larkins et al. v. Biddle et al..... 252
10. A bill filed by the donee, asking the reformation of a deed of gift, which, it is alleged, was intended to secure the property thereby conveyed to her sole and separate use, free from the debts of her husband, is not multifarious, because it joins as defendants certain judgment creditors of her husband, who were about to levy their executions on the property, and her husband's administrator who was about to bring suit against her for the property..... 252
11. An amendment to a bill can only be allowed when the bill is defective in proper parties, or in the prayer for relief, or in the omission or mistake of some fact connected with the substance of the case..... 252
12. Where the amendment is inconsistent with the original bill, and makes a new case, a demurrer will lie to it..... 252
13. Where a bill was filed for the reformation of a deed of gift, and the original bill alleged that it was the intention of the donor, at the time of the execution of the deed, to settle the slaves thereby conveyed *to the sole and separate use of the complainant, free from the debts of her husband;* and the amended bill alleged that it was the donor's intention, at

the time of the execution of the deed, to secure said slaves *to the sole and separate use of the complainant during her life, and at her death to her children, Held:*
That the amendment made a new and different case from the original bill..... 252
14. If the creditor elects to follow the proceeds of the land in the hands of the fraudulent grantee, the purchaser from him is not a necessary party to the bill.—Bryant v. Young, Hall et al..... 264
15. An answer which denies the allegations of the bill upon information merely, and calls for proof of them, does not require the proof of two witnesses, or of one witness with corroborating circumstances, to overcome the force of its denial.—Paulding v. Watson and Eidson..... 279
16. A bill was filed to enjoin a judgment at law, founded on a note alleged to have been given for a gaming consideration; and the defendant, who was an assignee of the note, denied the alleged gaming consideration, upon information merely, and called for proof. The note, which was for $1030, was dated Sept. 17, 1836, and payable Jan. 1, 1837; and the bill was filed in 1845. The only witness examined as to the consideration, testified, that, in the spring of 1836, he was present at a certain place while the maker and payee of the note were playing at cards, and that the maker then gave to the payee, on account of his losses at cards, his promissory note "for one thousand dollars, perhaps a few dollars more;" that the note was dated at the time of the transaction, but witness did not recollect when it was payable. The witness also testified, that the payee of the note was a gambler and horse-racer. *Held:*
That, in the absence of all proof showing other transactions between the maker and payee in which the former gave his note to the latter, the testimony of this witness was, of itself, sufficient to outweigh the formal denial of the answer, and establish the identity of the note which he saw executed with that on which the judgment was founded..... 279
17. Where a bill is filed to enjoin a judgment at law, and no release of errors is filed, the Chancellor can do no more than dissolve the injunction on that account; he cannot dismiss the bill for that reason..... 279
18. Where defendant suffered judgment by default to be rendered against him, on a note founded on a gaming consideration, and, after the lapse of more than seven years, filed a bill in equity to enjoin it, and showed no excuse for his neglect or delay, he was taxed with the costs, both of the Court of Chancery and the Appellate Court, and the judgment was perpetually enjoined..... 279
19. Where a judgment is rendered against a non-resident defendant in an attachment suit, predicated upon a mere colorable levy of the writ upon a chattel of trifling value as the property of the defendant, to obtain relief against which he files his bill in equity, alleging that he was not indebted to the plaintiff, which allegation the plaintiff in his answer denies, the judgment thus obtained does not impose upon the complainant the *onus* of proving the negative allegation, that he was not indebted to the plaintiff in attachment.—Grier v. Campbell..... 327
20. The lapse of two years and eight months from the rendition of a judgment at law, held, not such as to bar relief in equity against it..... 327
21. When a bill is dismissed by the Chancellor, upon the final hearing on bill, answer, exhibits and proof, and the cause is brought to the Appel-

late Court by writ of error, where the decree is reversed, that court will not remand the cause, that further evidence may be taken, but will render such decree as the Chancellor should have rendered..... 327

22. Where a bill is filed by the distributees of an estate against the administrator, to set aside a transfer which he had fraudulently obtained from them of their interest, and to recover their distributive shares, his securities on his official bond may be joined as defendants.—Gerald, Admr. v. Miller's Dist..... 433

23. Neither the administrator, nor his securities can complain in such case that no decree, except for costs, is rendered against the sureties..... 433

24. An objection to the master's report, which is not on its face erroneous, cannot be raised for the first time in the Appellate Court, no exception having been taken to it in the court below, and no objection there made to its confirmation..... 433

25. Where a bill is filed to foreclose two mortgages on land, one executed by the mortgagor and his wife jointly, and the other by the mortgagor and the wife's guardians, who were irregularly appointed by the Orphans' Court, without the issue of a writ *de lunatico inquirendo*, upon the mere petition of her husband, alleging that she was *non compos mentis;* and the guardians are made parties to the bill, but the wife is not—it is error to proceed to a final decree, until the wife is properly brought in; nor can the complainant excuse his neglect in failing to proceed regularly against her, by setting up her want of interest in the mortgaged property; nor is the error cured by the subsequent appointment of a guardian *ad litem* for her.

[Chilton, J. *dissenting*, held, that the wife was not a necessary party to the bill, as the court could not, by any decree rendered in the foreclosure suit, affect her right to dower in the mortgaged premises.]—Eslava et al. v. Lepretre..... 504

26. It is erroneous to render a final decree against a non-resident defendant, who has not answered, or otherwise submitted to the jurisdiction of the court, without the execution of the bond required by the statute, (Clay's Digest, 353, § 45,) although a decree *pro confesso* has been regularly entered against him on notice by publication..... 504

27. In a foreclosure suit, if the defendants, being adults, do not suggest to the court that the mortgaged premises greatly exceed in value the amount of the mortgage debt and are capable of sub-division, and move for a reference to the master to ascertain these facts, the Chancellor may well go on, and decree a sale of the whole of the mortgaged premises; and this, notwithstanding there are two mortgages, between the same parties, for the same debt, and differing only as to the premises conveyed. 504

28. But a different rule would prevail, if any of the defendants were infants, persons *non compotes mentis*, or under any other legal disability which would prevent them from appearing and contesting the matter with the complainant..... 504

29. It is discretionary with the Chancellor to allow time for the payment of the sum reported by the master to be due on the mortgage debt; he may decree a foreclosure and sale absolutely, without giving day to the mortgagor, and such decree will be free from error..... 504

30. It is irregular to take any order in a chancery proceeding, generally affecting the merits of the case, until it is at issue as to all the parties; if

the person not before the court is regularly made a party, by proper allegations and prayer for subpœna, the irregularity cannot be excused by the supposition that he is not a necessary party..... 504
31. A decree may be rendered without proof, when the bill has been taken for confessed on personal service, whether the defendant be a resident or a non-resident, (Clay's Digest, 354, § 58.)—Carradine v. O'Connor..... 573
32. A decree *pro confesso* cannot be rendered against a defendant who has not been served with process.—Hurter et al. v. Robbins..... 585
33. A defendant against whom a decree *pro confesso* has been regularly rendered, has no right, except by consent or by leave of the court, to file an answer after the master has made his report upon a reference to him to take an account..... 585
34. Courts of equity, acting upon the analogy of the statute of limitations, and in imitation of the court of law, will refuse relief if the legal title would have been barred at law.—Nimmo v. Stewart..... 682
35. Where the legal title would be barred by six years' adverse possession, the same rule must be applied when a complainant comes into equity upon an equitable title, disconnected from a trust as between him and the defendant..... 682
36. When the bill shows upon its face that complainant's remedy is barred by the statute of limitations, the benefit of the statute can be invoked by a general demurrer..... 682
37. Matters arising subsequently to the filing of the original bill cannot be added by way of amendment, but must be brought to the view of the court by supplemental bill.—Barringer et al. v. Burke..... 765
38. When a bill is filed in the name of husband and wife, respecting the wife's separate estate, and at the hearing the wife moves the court for leave to amend the bill, by making her husband a defendant, and inserting the name of some responsible person as next friend, the action of the Chancellor upon the motion is discretionary, and his refusal to grant it not revisable on error.—Michan & wife v. Wyatt..... 813
39. To authorize the dismissal of a bill on final hearing on account of the misjoinder of complainants, the misjoinder must be of complainants whose interests are so diverse that the Chancellor cannot include them in one decree, or, at least, must differ so widely as materially to affect the propriety of the decree..... 813
40. Where a bill is in form the bill of husband and wife, yet, in substance and fact, it only concerns the separate estate of the wife, and seeks only to establish her rights and protect her interests, and asks no relief for or against the husband, he will be regarded as her next friend or trustee, and the decree rendered will be conclusive on the wife..... 813
41. But if the bill seeks relief either for or against the husband, the Chancellor should order it to stand over, until it can be reconstructed, so as to make the husband a defendant, and interpose a next friend to prosecute for the wife; and this, whether the objection be made by demurrer, plea, answer or for the first time at the hearing; but in the last case, it is left to the sound discretion of the Chancellor, whether he will allow it, or dismiss the bill without prejudice to the wife..... 813

CHARGE OF COURT.

1. Where the plaintiff's right to recover depends upon three or more distinct

facts, a charge which assumes that he may recover if only two of those facts are established, is erroneous, if unexplained by other instructions; and the judgment will be reversed for the error, although the bill of exceptions recites that "other charges were given," which are not set out [Phelan, J., *dissenting*, held, that if an affirmative charge touching the merits of the action is correct, it should not be held erroneous because it does not likewise embrace formal and technical matters, unless exception is taken in the court below for that reason.]—Rowland and Heifner v. Ladiga's Heirs..... 9

2. When all the evidence given on the trial proceeds from the State, and it is without conflict, and establishes beyond a doubt the guilt of the accused, it is not error for the court to charge the jury, "that if they believed the testimony, they ought to find the defendant guilty."—Thompson v. The State..... 42

3. When an erroneous affirmative charge is given by the court, either of its own motion, or at the instance of the opposite party, and it is excepted to, it is unnecessary to set out in the bill of exceptions the evidence upon which it is founded.—Carter v. Doe ex dem. Chaudron..... 72

4. The refusal to give a charge in the precise language asked by counsel, is not error, provided the charge that is given is a full and fair exposition of the law.—Ewing v. Sanford..... 157

5. When the bill of exceptions sets out several distinct charges and refusals to charge on request, and concludes with the words, "to which defendant excepted," the exception will be construed to apply only to the charge and refusal contained in the paragraph immediately preceding it.—Andress v. Broughton..... 206

6. When there is a conflict in the testimony, a charge upon the facts of the case, which assumes the contested fact as proved, invades the province of the jury, and is properly refused.—Skains and Lewis v. The State..... 218

7. When the court below charges the jury, that, if they believe all the proof, the plaintiff is not entitled to recover, the plaintiff, wishing to revise the charge in the Appellate Court, must set out in the bill of exceptions all the evidence upon which it was predicated.—Barnes & Barnes v. Mobley. 232

8. Where the evidence is such as to render the general rule of law inapplicable to the case, the court may properly refuse to give it in charge.—Ross Admr. v. Pearson..... 473

9. Where the charge given, if not critically correct, is fully as favorable to the plaintiff in error as if the court had charged the law correctly, the error furnishes no ground of reversal..... 473

10. When the question is one of fraudulent intention in the execution of the deed, the court cannot pass upon the effect of the testimony, but must leave the question of fraud *vel non* to the decision of the jury; but when the bill of exceptions recites, that "it was expressly proved that the conveyance to the plaintiff was made to delay, hinder and defraud the grantor's then existing creditors," and that there was no conflict in the proof, it is not error to charge the jury, "that if they believe all the evidence, they must find for the defendant."—Stokes v. Jones..... 731

11. When the testimony is clear and without conflict, and it is only necessary to draw a legal conclusion from it, it is not error for the court to charge the jury, that, if they believe the evidence, they must find for the party whose case is thus made out.—Abney, Admrx. v. Pickett..... 739

COMMISSIONERS COURT.

1. Where commissioners are appointed, under an act of the Legislature, to contract for and superintend the erection of county buildings, the acts of the majority, in making the contract and receiving the buildings, are binding on all; but one cannot be held responsible for the acts or defalcations of the others.—Commrs.' Court of Tallapoosa v. Tarver..... 661
2. The act of 1843 (Pamphlet Acts, 134) authorizing the Commissioners' Court of Tallapoosa to levy a county tax for the purpose of discharging the liability previously incurred by certain commissioners appointed under acts of the Legislature, to contract for the erection of certain county buildings, was intended to cover the liability legitimately incurred by them in the discharge of their public duties; and counsel fees incurred by them, acting in good faith, in the defence of a suit instituted against them by the contractors, properly constitute a part of that liability..... 661
3. Before the Commissioners' Court could be compelled to levy the tax authorized by the act of 1843, it was the duty of the relator to prove to the court the extent of the liability incurred by him, as one of said commissioners, in the discharge of his official duties; and an answer averring that said court had refused to make the appropriation to meet his liability, because he had never afforded to the court any proof or information as to the extent of his liability, is a sufficient answer to the alternative writ issued to them, on his application for a *mandamus* to compel them to levy the county tax..... 661
4. The Commissioners' Court of Roads and Revenue in this State is a court of limited jurisdiction; and its proceedings, like those of all courts of limited jurisdiction, must show upon their face sufficient to support its jurisdiction, or its judgments are not merely voidable, but void.—Lamar v. Commrs'. Court of Marshall County..... 772

CONSTABLES.

1. A party is incompetent to execute process in his own favor. But mere identity of name will not authorize the court to infer, in the absence of a direct allegation in the pleadings, that the plaintiff in the writ and the deputy constable by whom it was executed are the same person.—Boykin v. Edwards..... 261

CONTRACT AND AGREEMENT.

1. Any act of the plaintiff, from which he may sustain any detriment or inconvenience, or from which the defendant derives a benefit, is a sufficient consideration to support a promise.—Holt v. Robinson..... 106
2. If the plaintiff has a just cause of action against the defendants, it cannot be defeated or released by any contract or agreement between the parties which is not supported by a valid legal consideration.—Pounds v. Richards et al..... 424
3. Where a written instrument, in form a conditional note, is signed by the maker with the distinct admission on the part of the payee that it does not contain the terms of their contract, and the understanding that they will meet again at a convenient time and execute another instrument truly setting out the contract, the writing has not the force of a contract good and complete in law, for want of an absolute, unconditional delivery; and if suit is instituted upon it, as a note, it is not evidence as such for any purpose.—Hopper v. Eiland..... 714

4. A proposition or offer made by letter which is not replied to within a reasonable time, cannot be considered as a contract.—Martin v. Black's Executors..... 721
5. Although the law will sometimes rescind a contract in favor of one party, on account of the default or misconduct of the other, yet when he who seeks a rescission can allege no default or misconduct against the other party, he cannot at his election annul it.—Walker v. Clay & Clay..... 797

COSTS.

1. In debt on bond given for the security of costs, it is not necessary to allege in the declaration, that an account or bill in writing containing the particulars of the fees was produced or ready to be produced to the defendant, nor that the clerk and sheriff kept fee books in which were entered the fees sought to be recovered.—Pryor v. Beck..... 393
2. After the cost is taxed it becomes part of the judgment, and cannot be impeached, when drawn in question collaterally, either in the court in which the judgment was rendered, or in any other; the items of cost can only be re-examined by a direct motion to retax, made in the court in which the judgment was rendered..... 393
3. In debt on bond for security of costs, the plaintiff can recover the fees of the witnesses who were summoned by the plaintiff in the original suit; he is a trustee for the benefit of all, and must recover to the extent of the interest of all who were designed to be protected by the bond..... 393

CRIMINAL LAW.

1. When a person is indicted for obstructing a public road opened by an overseer *de facto*, he cannot defend his own misdemeanor under the overseer's supposed want of authority, although the obstruction consisted in putting up his own fences, which the overseer had pulled down in opening the road.—Thompson v. The State..... 42
2. On the trial of an indictment for murder, the question before the jury was, the identity of the prisoner with the murderer. The State offered in evidence the registers of three several hotels, each from a different city, and each containing a different name, accompanied by parol proof that the three names were written by the prisoner, and that he was known by them respectively in the three cities; and they were admitted without objection from the prisoner. *It was held:*
That, in considering the question whether the three names were written by the same person, the jury might compare the hand-writings in the several registers.—Crist v. The State..... 137
3. There is not any fixed form of words, in which the minute entries of courts are required to be made. They should show substantially that all was done at the trial which the law requires to be done, and this should be set down in fit and expressive words; but the form adopted in England, and followed in some of the United States, is not indispensably necessary to their legal sufficiency..... 137
4. Although a trial may continue through several days of the term, and the adjournment and re-assembling of the court may be noted by the clerk on the minutes; yet, all that is recorded therein, from the beginning of the trial to the judgment, must be regarded as but one entry, and the whole may be looked to, to ascertain its sufficiency..... 137
5. Where the minute entry in the record recited: "Thereupon came a jury,

to-wit:" (here follow their names) "good and lawful jurors, who were selected and empanneled, well and truly to try the issue joined between the State of Alabama and the said defendant, and the trial of said cause commenced," and that the court adjourned in the evening until the following morning, the trial not being finished; and the next minute entry, after reciting that the court re-assembled on the following morning, continues: "Thereupon also came the defendant and his counsel, as also the counsel for the State, together with the jury that had been empanneled *and sworn as aforesaid*, and the trial of said cause was resumed; and after the evidence of all the witnesses had been given in, and the argument of counsel had been heard, the jury received the charge of the court, and retired in charge of the sheriff to make up their verdict, and now return into court, and *on their oaths* do say," &c. *It was held:*
That it sufficiently appeared from the record that the jury was sworn; and that the Appellate Court would presume they were sworn before the testimony was heard..... 137

6. When the jury in a criminal case is sworn "well and truly to try the issue joined between the State of Alabama and the said defendant," and the record shows that the defendant had been arraigned on an indictment for murder, and that he had pleaded "not guilty," the oath is a sufficient compliance with the requirements of the forty-sixth section of the tenth chapter of the Penal Code, (Clay's Digest, 458.)..... 137
7. Whether the objection can avail in any case, that the past instead of the present tense is employed in recording the action of the court and jury, *quaere?*..... 137
8. When two are indicted for an affray, proof "that several months before the occurrence of the affray, they had fought together, on which occasion one had attempted to strike the other, and said he would kill him if he could get at him," is not admissible evidence against the one making the threat, when there is no proof connecting this rencounter with the affray for which the parties were on trial, or showing that the latter grew out of the former.—Skains and Lewis v. The State..... 218
9. The eighth section of the third chapter of the Penal Code, (Clay's Digest, 413, § 8,) was intended to create a new offence, and attach to it a new penalty; and before the penalty denounced by it against the offender can be inflicted, the indictment must be framed in reference to the statute, and conform to its letter or substance..... 218
10. When two are indicted for an affray at common law, it is erroneous for the court, by its instructions to the jury, to take away or limit their discretion with regard to the amount of the fine to be assessed in the event of a conviction..... 218
11. An affidavit, made by the defendant, that certain goods of the value of thirty dollars, the property of certain persons named in the affidavit, had been feloniously stolen by some person or persons unknown to affiant, and that, from probable cause, he supposed said goods were concealed in a trunk belonging to the plaintiff and another person, does not amount to a charge of larceny against the plaintiff, if he fails to account satisfactorily for his possession.—Field v. Ireland..... 240
12. But such affidavit is equivalent to a charge of knowingly concealing stolen goods, although it may not contain the statutory requisitions necessary to constitute that offence, and authorizes the justice to issue his war-

rant for the arrest of the person in whose possession the goods are alleged to be..... 240
13. Actual force, or a manual touching of the body, is not necessary to constitute an arrest; it is sufficient, if the party is within the power of the officer, and submits..... 240
14. If a wound is inflicted not dangerous in itself, and the death which ensues was evidently occasioned by the grossly erroneous treatment of it, the original author will not be accountable.—Parsons v. The State..... 300
15. But if the wound was mortal or dangerous, the person who inflicted it cannot shelter himself under the plea of erroneous treatment..... 300
16. The evidence was conflicting, as to whether the deceased came to his death from the effects of a wound inflicted by the prisoner, or from the improper treatment of it by the attending physician in sewing it up. The prisoner's counsel requested the court to charge, that if the wound was not mortal, and it clearly appeared that the deceased came to his death from the erroneous treatment, and not from the wound, they must acquit the prisoner. This charge the court gave, with this qualification, "that if the ill treatment relied on was the sewing up of the wound, the defendant would not be excused if otherwise guilty." *Held:*
That the legal proposition asserted by the qualification to the charge was erroneous. (Goldthwaite, J., *dissenting.*)..... 300
17. Where a person is indicted for selling spirituous liquors to a slave, and it is proved that the liquor was sold, in his absence, by his clerk, it is error to instruct the jury, "that, if the defendant had previously sanctioned the acts of his clerk in selling liquor to slaves under similar orders, and if they believed that the defendant, if he had been present, would have done as his clerk did, then they were authorized to find him guilty."—Patterson v. The State..... 571

DAMAGES.

1. In an action to recover damages for diverting water from the plaintiff's mill, the declaration or statement of the cause of action is demurrable, if it does not show that by such diversion the quantity of water that continued to flow to the mill was insufficient, or that the plaintiff or his mill was thereby injured.—Burden v. The Mayor, &c., of Mobile..... 309
2. In debt on bond, executed in pursuance of an order of the Chancellor, as a condition precedent to the issuing of a *ne exeat*, the condition of which is, that the plaintiff in the writ shall prosecute his suit and writ to effect, or, failing therein, shall pay or cause to be paid to the defendant, "all such costs and damages as he may sustain from the *wrongful* suing out of said writ," the plaintiff can only recover for the damages *actually* sustained by the wrongful suing out of the writ, and not such damages as he might recover in case if the writ had been sued out *maliciously;* the writ may have been sued out wrongfully, and yet without malice.—Spivey v. McGehee et al..... 417
3. But the plaintiff cannot recover upon proof merely that the *ne exeat* was wrongfully sued out; he must also show, that the writ was not prosecuted to effect within the meaning of the bond..... 417
4. An action on the case lies to recover the damages actually sustained by the wrongful suing out of an attachment; and if the attachment was sued out maliciously as well as wrongfully, vindictive damages may also

be recovered, without, in either case, waiting for the determination of the attachment suit.—Seay v. Greenwood..... 491
5. The costs of the justice's court, before whom the attachment was returnable, are recoverable in case, as part of the damages actually sustained; but where the case is taken by the defendant to the Circuit Court, by appeal, where he files his pleas, and afterwards withdraws them, for a valuable consideration paid him by the plaintiff, and suffers judgment by *nil dicit*, he cannot recover the costs of the Circuit Court..... 491
6. Reasonable and necessary counsel fees expended in defence of the attachment suit, are recoverable in case for the wrongful suing out of the writ. 491

DEBTOR AND CREDITOR.

1. If a debtor makes a payment to his creditor holding two several demands against him, and does not at the time of the payment direct how it shall be applied, the creditor has the legal right to appropriate it to either demand; but if he does not make the application until after suit is brought on both demands, neither party would be allowed to direct its application, but the law will appropiate it for them according to its own notions of justice.—Callahan v. Boazman..... 246
2. When the payment is made in cotton, at a price to be ascertained at a future time, with a general direction that it should be applied to "all just demands which the creditor might hold against him," the creditor cannot make the application until the price is ascertained; and if, before that time, he brings suit against the debtor on both demands, the right of appropriation is taken away from both parties by the institution of the suit, and the law must apply the payment..... 246
3. Where the creditor has two demands, the one a specialty debt, and the other an open account, and the debtor makes a general payment, without any direction as to its application. the creditor is not bound to apply it to the older of the two demands..... 246
4. When the debtor makes a general payment, without declaring at the time in what manner and to what demand he wishes it applied, the creditor is not bound to notify him of the manner in which he has appropriated it, before the debtor will be deprived of his right to direct the application. The only obligation which he owes to the debtor is, to make the application in good faith, so as to extinguish *pro tanto* the demand to which it is applied..... 246
5. A conveyance executed by an insolvent to one of his creditors, absolute on its face, but accompanied by a contemporaneous parol agreement that it should operate only for the grantee's indemnity, is fraudulent and void as to the other creditors of the grantor, and will be set aside in equity.—Bryant v. Young, Hall et al..... 264
6. A debtor who is in failing circumstances may make an assignment preferring one creditor or class of creditors to another; if the assignment conveys his whole property, and contains no stipulation for a share of the proceeds to result to himself, and reserves no control whatever over the property, he may provide for the payment of one class of creditors absolutely, and for another class only on condition of their releasing all further claim upon him, by signing the deed containing such stipulation.—Rankin, Duryee & Co. et al. v. Lodor..... 380
7. If the provisions of the deed are clearly beneficial to the creditor, his as-

sent to it will be presumed, without his signing it; otherwise, his assent must be actually had..... 380

8. Generally, where the debtor seeks to postpone the payment of his debts, by conveying property in trust to secure or pay them, *all* the creditors must assent to the deed, to give it *any validity*, because that is the manifest intention of the grantor..... 380

9. A deed of trust executed by a firm and one of the partners individually, who were in failing circumstances, to secure the payment of their debts, contained the following provisions: The trustee was authorized to receive, collect, sell and dispose of all the property conveyed by it, with all convenient speed, on such terms as he might deem expedient, and out of the proceeds, after first discharging the costs and expenses of the trust, to pay the debts of the creditors, who were made parties of the third part to the deed, according to their priority in signing it; first, those who assented to it within *ninety* days were to be paid equally in full: secondly, those who assented to it within one hundred days, in like manner, out of the residue; and thirdly, those who assented to it within one hundred and twenty days. The trustee was also authorized to carry on the business of the firm until the assent or dissent of the creditors should be expressed, or until the expiration of a reasonable time for ascertaining it, and to employ clerks and agents to assist him in the execution of the trust; the trustee was not to be chargeable, except for his own acts and defaults, nor for any moneys except such as actually came to his hands, nor for any loss that might happen without his wilful default. The deed also contained a provision, by which those creditors who assented to it, released all their claims and demands against the grantors. *It was held:*
   1. That the assent of *all* the creditors was not required, to give the assignment operative force and effect as a deed; but the assent of any one of them made it complete in law, and vested the whole legal title in the trustee;
   2. That after the whole legal title was thus vested in the trustee, the levy of attachments and executions on the property by other creditors did not give them any preference or priority over those creditors who subsequently assented to the deed, within the time prescribed by it..... 380

DEEDS AND CONVEYANCES.

1. When a conveyance under seal is executed by an agent, to constitute it the deed of the principal he, and not the agent, must appear from the body of the deed to be the grantor, and the deed must be signed with his name and purport to be sealed with his seal.—Carter v. Doe ex dem. Chaudron..... 72

2. One seal may be adopted by any number of persons, and answer for all of them; and where the seal affixed might be regarded as the seal either of the agent or the principal, since the seal of itself is incapable of identification as the seal of either, we must look to the body of the instrument, and construe it to be the deed of the party intended to be bound by it as grantor..... 72

3. A deed was executed in these words: "This indenture made and entered into between J. K. (the principal) and S. H. G. (the agent,) both of Mobile city in the Alabama Territory, of the first part, and D. D. of the city and Territory aforesaid, of the other part, witnesseth: Whereas, the

said J. K., by his certain letter of attorney under his hand and seal duly executed, dated March 23, 1818, amongst other things therein contained, did authorize the said S. H. G., in the name of him, the said J. K., and in his behalf, to execute deeds, make sale of such part of his lots and lands, tenements and hereditaments in the town of Mobile, county and Territory aforesaid, as by the said S. H. G., shall be thought fit to be sold. Now, this indenture witnesseth, that, for and in consideration of the sum (and) covenants hereinafter mentioned, reserved, and contained, on the part and behalf of the said D. D. to be paid, done and performed, he, the said J. K., by his attorney, S. H. G., hath granted and sold, and by these presents (doth) grant, sell and convey, unto the said D. D. the lots," &c. (here follows a description of them,) "for the sum of fifty dollars each, making altogether the just sum of three hundred dollars, to be paid by the said D. D., his heirs, executors and administrators, to the said J. K., his heirs or assigns, so soon as the Government of the United States shall have confirmed to the said J. K., or his heirs, the title to the said bargained lots of land: To have and to hold the above specified lots, together with all the privileges and appurtenances thereunto belonging, unto the said D. D., his heirs and assigns forever: *Provided, nevertheless*, and it is the true intent and meaning of these presents, and of the parties thereunto, that the said D. D., his heirs, executors and administrators, shall pay, or cause to be paid, to the said J. K., his heirs or assigns, the yearly interest of eight *per cent.* on the said sum of three hundred dollars, until the covenants before mentioned are complied with, the interest to commence from the first day of this present month, January. In witness whereof, the parties have hereunto set their hands and seals. Mobile, January 18, 1819." (Signed) "S. H. G. [Seal] Attorney in fact for J. K." *Held:*

1. That the deed was well executed as the deed of J. K., the principal;
2. That it conveyed to the grantee but a conditional fee, dependent upon the yearly payment of interest as therein provided;
3. That the grantor and his privies, as to the legal title, are estopped by his deed from saying that it did not pass; and that, upon the confirmation of the grantor's title by the Government, the whole legal title vested in the grantee..... 72

4. A deed more than thirty years old, having nothing suspicious about it, is presumed to be genuine, without express proof, the witnesses being presumed dead; and when it is found in the proper custody, and is corroborated by enjoyment under it, or by other equivalent explanatory proof, it is allowed to prove itself..... 72

5. When the deed is acknowledged by the grantor on the day of its date, it is a sufficient compliance with the statute, although the certificate of acknowledgment does not state that he acknowledged that he executed it on the day of its date..... 72

6. At the common law, a freehold title could be released in five ways: 1. To the tenant of the freehold in fact or in law, without any privity: 2. To the remainder-man; 3. To the reversioner without privity; 4. To one having a right only by privity; 5. To one having a privity only without right. But in this country, the technical rules relating to releases are generally held not to apply, and a quit claim deed is considered as passing the title of the releasor, without any warranty as to outstanding titles or incum-

brances, but merely against the grantor himself and those claiming under him, either by descent or by subsequent conveyances.—Smith's Heirs v. Branch Bank Mobile..... 125

7. Where the fee of lands was in the wife by inheritance, the deed of husband and wife, acknowledged in the ordinary form, would not, previously to the passage of the act of 1848, pass the fee to the grantee; her title could only be conveyed by deed acknowledged by her on private examination.—Doe ex dem. Hughes v. Wilkinson..... 296

8. Husband and wife, by deed dated May 16, 1839, conveyed lands belonging to the wife in fee simple by inheritance, and the certificate of acknowledgment appended to the deed recited, that, "on the 16th and 17th day of May, 1837," they "both personally appeared," &c., and "acknowledged the above instrument to be their free act and deed." The wife also executed a conveyance, dated May 17, 1839, and written on the back of the said deed, by which she remised, released, relinquished and forever quitclaimed, to the said grantee, all right, title, interest and claim to dower, which she then had as wife of the said grantor, or might thereafter have as his widow, to the lands and premises conveyed; and at the foot of this instrument, was written the certificate of a justice of the peace, that, on said 17th May, 1839, on private examination, separate and apart from her husband, "she acknowledged that she signed, sealed, and delivered *the foregoing instrument*, as her voluntary act and deed," &c. *Held:*
That the last certificate applied only to the conveyance immediately preceding it, and did not extend to the deed executed by husband and wife; and that, upon her death, if she survived him, or upon his death, if he survived her, the fee vested in her heirs at law, and they could immediately assert it against the tenant in possession..... 296

DEPOSITION.

1. When an objection is made to an entire deposition as being incompetent evidence, the objection may be overruled, if any portion of the deposition is admissible.—Love v. Dargan..... 583

DETINUE.

1. The gist of the action of detinue is the *wrongful detention* of the property, and therefore the action cannot be maintained where the holding over was permissive, so long as that kind of possession continues.—Benje v. Creagh's Adm'r..... 151

2. When the plaintiff in an action of detinue has color of title, and has had the peaceable possession of the chattel sued for, he can recover as against a mere wrong-doer who, by indirection or force, obtains and holds the present possession.—Shomo v. Caldwell..... 448

3. One who has not the entire interest in the property sued for cannot maintain detinue.—Frierson v. Frierson..... 549

4. An endorsement by the sheriff on a writ in detinue, that, by virtue of the writ, he had taken the property therein described, and five days having elapsed, and the defendant failing and refusing to put in bond, and the plaintiff having put in bond within five days, that the property had been delivered to the plaintiff, is not sufficient to show that he had executed the writ on the defendant, and will not support a judgment by default.—Fowler v. Banks..... 679

DEVISE, LEGACY AND BEQUEST.

See WILLS.

DOWER.

1. A wife is not entitled, as against the mortgagee, to dower in lands which are conveyed to her husband, and by him on the same day mortgaged to his vendor, to secure the payment of the purchase money.—Eslava v. Lepretre..... 504
2. The wife's right to dower in lands aliened by her husband during coverture, can only be relinquished by herself in person..... 504
3. In allotting dower in equity to a widow, it must be computed according to the value of the land at the time of the alienation by the husband, and not according to its value at the time of the allotment.—Linn v. Robinson and Pollard..... 547

EJECTMENT.

1. A plaintiff claiming under execution sale takes only the title which the defendant in the execution had; and although that may have been such a legal title as was subject to levy and sale, yet the defendant may defend by showing a superior legal title outstanding in another.—Stevens v. King..... 429
2. In ejectment, plaintiff claimed under a purchase at execution sale, and proved that the land was devised to the defendant in execution by his father, who had held possession under a bond for titles from one Y., and had paid the purchase money in full; defendant relied upon a contract for the purchase of the land from an Indian reservee, under the treaty of March 24, 1832, approved November 1, 1834, mesne conveyances from the grantees to said Y., and from him to one H. *Held:*
   That the outstanding legal title shown by defendant was superior to plaintiff's..... 429
3. In ejectment, the usual notice and declaration are sufficient to bring the defendant into court.—Cruise v. Riddle..... 791

EMBLEMENTS.

1. Under the act of 1850, the husband becomes tenant for the life of the wife of the rents and profits of her estate, and, like any other tenant for life, he is entitled to *emblements*, that is, the crop growing or matured, whether gathered or not, at the termination of the life estate.—Weems, Ex'r. v. Bryan & Wife..... 303
2. The right to emblements does not obtain until the seed is sown, and does not include the costs of preparing the ground for the reception of the seed, when the term is determined by the death of the tenant for life before the seed is actually sown.—Price v. Pickett et al..... 741
3. When the life estate falls in before the end of the year for which the land is leased, the remainder-man is entitled to the entire rents from the death of the tenant for life to the end of the year, subject to the right of emblements..... 741

ERROR.

1. To entitle the plaintiff in error to a reversal, he must show injury as well as error.—Smith v. Ewers..... 38

2. The Appellate Court will only consider such errors as are assigned and insisted on.—Van Eppes v. Smith..... 317
3. Error without injury will not reverse a judgment; but error raises the presumption of injury, and unless this presumption is repelled beyond doubt, the cause will be remanded for another trial.—Spivey v. McGehee. 417
4. The Appellate Court will not look to grave and doubtful questions, which are not raised by the assignment of errors, and are not connected with the question in which the error is found, for the purpose of deciding that the error did not work injury..... 417
5. All assignments of error should point to a particular part of the proceedings of the court below, in which the error complained of is thought to exist; an assignment is too general which alleges, that "the bill and amended bill were not sufficient to warrant the proceedings had on them;" so also, "that the proceedings were irregular, informal and insufficient, and not in accordance with the rules of Chancery Practice."—Eslava et al. v. Lepretre..... 504
6. The admission of irrelevant testimony will reverse, unless the record clearly shows that no injury could have resulted; it is not enough that the Appellate Court is not able to discover injury: it must see clearly that none could have resulted.—Frierson v. Frierson..... 549
7. An appellate court will not reverse the proceedings of an inferior tribunal, for an error which works no injury to the party complaining.—Ex parte Keenan..... 558
8. But error implies injury, and must reverse the judgment, unless the record itself repels the presumption of injury, and shows that, notwithstanding the error, there was no injury, (*per* Dargan, C. J.)..... 558
9. When application is made to a circuit judge for a *certiorari*, to review the proceedings of the Commissioners' Court in the establishment of a road, the petitioner *prima facie* shows *legal* injury, by showing that the road was illegally established, and that it runs through his land: and the writ should be granted..... 558

ESTATES OF DECEASED PERSONS.

1. Where the settlement of an administration is withdrawn from the Orphans' Court, by a bill filed in the Court of Chancery, and the cause is progressing in the latter court, it is competent for that court, if the exigencies of the estate require it, to direct, by interlocutory decree, a sale of the slaves belonging to the estate, for cash, at an unusual season of the year for selling such property, upon the petition of the administrators or of the creditors; and this, even before an accounting is had between the administrator and the complainants.—Pearson v. Darrington..... 169
2. The auditing and stating of an executor's account is a necessary preliminary to a final settlement; and in all cases, both before and since the passage of the act of 1843, the account *as stated*, whether by the executor or by the court, should lie over, and be presented for allowance at a subsequent term, of which at least forty days' notice should be given.—Rhodes, Exr., v. Turner & Wife..... 210
3. A final decree of settlement should be definitive as to all the liabilities of the executor to the estate, and should award distribution of the entire fund in his hands, having all the distributees before it..... 210
4. A decree rendered by the Orphans' Court, upon the application of an ex-

ecutor, by which an amount is ascertained to be in his hands, a portion of which he is ordered to pay over to those entitled to it, and to retain the balance until the further order of the court, is not a final decree; but it may well be regarded as an interlocutory decree, and, being *prima facie* correct, unless impeached for errors or mistakes, may be made the basis of a final decree 210

5. At the common law, the lapse of seventeen years would not be sufficient to raise the presumption of payment by an executor, of the amount ascertained to be due to the legatees upon a settlement of his testator's estate; and the statutes of this State fix no period, as a limitation to proceedings in the Orphans' Court against an executor or administrator, to compel a final settlement. The statute prescribing six years, as a limitation to actions at law for an account, does not apply; for the court has the administration of the estate in progress, and the proceedings before it must be considered as *in fieri*, until the final settlement and discharge of the executor..... 210

6. But, according to the principles of the common law, a final judgment would be presumed to have been paid after the expiration of twenty years; and if the parties allow this period to elapse without taking any steps to compel a settlement from an executor or administrator, the presumption of payment arises in his favor; and this period would date from the time when he might have been called to a settlement..... 210

7. Where a decree was rendered by the Court of Probate against an administrator in favor of a succeeding administrator *de bonis non*, and was reversed, on writ of error to the Appellate Court, after the money had been collected under execution from one of the administrator's securities, and had been distributed among the legatees, and the security afterwards brought suit against the administrator *de bonis non* to recover the money, *It was held:*
That the administrator, on another settlement in the Court of Probate pending the action in the Circuit Court, was not entitled to a credit for the amount collected on the former decree.—Price v. Simmons..... 337

8. A notice of an intended *annual* or *partial* settlement will not authorize the rendition of a *final* decree.—King et al. v. Collins, Admr..... 363

ESTOPPEL.

1. In estoppels *in pais*, it is an indispensable and essential requisite, that the representations or acts should have influenced the conduct of the person setting them up or alleging them.—Pounds v. Richards et al..... 424

2. Where a surviving partner, on a settlement with the administrator of the deceased partner, accounts for a certain sum, as being due from a debtor to the firm, the settlement might, if unexplained, operate as an admission that such amount *only* was due from the debtor; but it would not estop the surviving partner, in a suit against the debtor, from recovering a larger amount. There can be no estoppel, where there is no privity.—Ross, Admr. v. Pearson..... 473

3. Where one knowingly suffers another, in his presence, to purchase property to which he has a claim or title, which he wilfully conceals, he will be deemed to have waived his claim, and will not afterwards be permitted to assert it against the purchaser or his privies; but if the person having the claim or title, and being so present, is not apprized of his rights, or if,

from any other cause, the duty of asserting them does not devolve upon him to protect the purchaser from injury, the reason of the rule ceases, as there is no violation of duty, and the rule itself does not apply.—Steele v. Adams..... 534

4. The *onus probandi* in such case lies upon the purchaser, to show that the party's silence was wilful; but this requires no positive proof, and may be inferred by the jury whenever the surrounding circumstances are such as to warrant the belief that his silence was incompatible with innocence of intention or object; and if such was the case, it is immaterial whether or not the act of the purchaser was influenced by it..... 534
5. But where the purchaser is already apprized of the existence and character of the claim, notice and the assertion of it would be a useless and unnecessary act, so far as he is concerned..... 534
6. In assumpsit to recover the proceeds of a note placed by plaintiff in defendant's hands for collection, on which defendant brought suit, for his own use, in the name of the payee, and recovered judgment, whereon execution was issued, and levied on certain bales of cotton, which were purchased at sheriff's sale by defendant, the return of the sheriff on the execution is not conclusive against the plaintiff, as to the amount of the proceeds of the sale.—Crow v. Hudson..... 560
7. A voluntary conveyance, with covenants of warranty, of lands in which, at the time of its execution, the grantor had not such an interest as could be subjected by his creditors either in law or equity, but to which he afterwards acquired title, is void as to creditors and subsequent *bona fide* purchasers, if made to hinder, delay and defraud the grantor's creditors; a voluntary fraudulent estoppel is impotent to defeat the just claims of creditors and *bona fide* purchasers.—Stokes v. Jones..... 731

ESTRAYS.

1. The fourth section of the act of 1820, (Clay's Digest, 550 § 4,) which gives a penalty against any person who shall sell an estray before the expiration of twelve months, applies only to estrays which are taken up and appraised as required by the first section of the act.—Smith v. Ewers.. 38

EVIDENCE.

1. When evidence is objected to as a whole, and a part of it is admissible, the objection may be overruled.—Rowland & Heifner v. Ladiga's Heirs.... 9
2. To show that she was "the head of a family," plaintiff had proved that her grand-child, a boy whose parents were dead, resided with her; and then offered to prove that she bought clothes for him, to which proof defendant objected. *Held:* That the evidence was admissible..... 9
3. In questions of pedigree, the declarations of deceased members of the family have always been received in evidence, to establish the parentage or descent of the particular individual whose relationship is the subject of investigation..... 9
4. The failure to object to evidence, or to move for its exclusion, concedes its admissibility.—Bartol v. Calvert, Admr..... 42
5. Although an *ex parte* survey, made by a county surveyor without an order of court, may not within itself be evidence, yet the surveyor may be examined personally to prove the boundaries of the land, and may illustrate his evidence by his own survey; and when the surveyor, by his own

testimony, has proved the accuracy of his survey, it may then go to the jury, as testimony tending to prove the locality of the land and its boundaries.—Nolin v. Parmer..... 66

6. The parol testimony of the surveyor in such case is admissible, although he testifies that all his knowledge respecting the boundaries of the land was derived from the survey which he had made..... 66

7. A deed more than thirty years old, having nothing suspicious about it, is presumed to be genuine, without express proof, the witness being presumed dead; and when it is found in the proper custody, and is corroborated by enjoyment under it, or by other equivalent explanatory proof, it is allowed to prove itself.—Carter v. Doe ex dem. Chaudron..... 72

8. In ascertaining whether an absolute deed was intended as a mortgage or a conditional sale, parol proof of the intention of the parties at the time of its execution may be received.—Bryan and McPhail v. Cowart..... 92

9. E. prosecuted S. for stealing a slave, which S. afterwards recovered from E. in an action at law; and after the termination of the prosecution, S. brought an action on the case for malicious prosecution against E. *It was held:*

That the record of the suit for the recovery of the slave was admissible evidence for the plaintiff.—Ewing v. Sanford..... 157

10. The declarations of one who is in possession of personal property, in disparagement of his own title, or repudiating title in himself, are competent evidence against himself, or against a subsequent purchaser from him, or one claiming to hold under him.—Barnes & Barnes v. Mobley..... 232

11. The declaration of one in possession of a slave, *made at the time of hiring* her to the witness, "that the slave belonged to the plaintiffs, who were minors and orphans," is admissible evidence for the plaintiffs, in an action of trover subsequently instituted by them for her conversion against a third person, as showing that he was but the plaintiff's bailee, and held the slave in that capacity, in subordination to their title, and not adversely to them..... 232

12. Where evidence is *prima facie* irrelevant, it is the duty of the party offering it to show its relevancy, by connecting it with other facts which are proved, or by offering it in connection with facts expected to be proved.—Bilberry, Admr. v. Mobley, use &c..... 277

13. It is the duty of the court, to decide the question of the admissibility of evidence at the time it is offered, if objection is then made to it; and although the subsequent proof of facts, upon which its admissibility depended, might cure the error, yet, where such facts do not appear affirmatively from the record, the decision of the court, in admitting the evidence, is not divested of error by instructing the jury that they must disregard it, unless there is other evidence to connect with it and make it admissible.. 277

14. On a trial of the right of property, between the plaintiff in execution and one claiming under a purchase from the defendant, the declaration of the defendant, that the sale was fraudulent, made when he was not in possession of the property, and when the claimant was not present, is *prima facie* inadmissible against the claimant, in the absence of proof connecting him with the fraud..... 277

15. On the trial of an issue *devisavit vel non*, between the executor, who was also the principal legatee, and another legatee, the declarations or admissions of the executor cannot be received to invalidate the will, which

makes provision for himself and several others, even when offered in connection with proof that it would be to the interest of all the legatees, except the executor, to set it aside.—Bunyard and Wife v. McElroy, Exr.. 311

16. Nor are the declarations of the testator, made by him some six or seven years before the execution of his will, that the executor and his wife "were constantly *ding donging* at him to make a will, but that he would not do it, and never meant to do it; that the law of Alabama would make a good enough will for him," admissible evidence against the executor 311

17. In assumpsit on a lost note, defendant, in answer to interrogatories filed by plaintiff, admitted the execution of the note, and stated, that it was paid soon afterwards, and was then destroyed by plaintiff. Plaintiff read the answer at the trial, and then offered a witness to prove, that he had seen the note after the day on which it was alleged by defendant to have been destroyed. *Held:*
That the evidence was admissible; and this, although plaintiff knew what his witness would testify, before he filed interrogatories to defendant.—Wilson v. Maria..... 359

18. A transcript of a judgment certified in due form by the proper officer is admissible in evidence for the plaintiff, in a suit against the securities for costs, although the clerk by whom it is certified may be entitled to a portion of the costs sought to be recovered.—Pryor v. Beck..... 393

19. A certified transcript of a judgment is only *prima facie* evidence of the judgment itself, and does not preclude the defendant from showing the true amount of the judgment; this may be done, either by introducing another transcript, for the true amount, certified by the same officer, (and then the jury must decide which transcript is correct,) or by copies connected with parol proof of their correctness..... 393

20. But an execution signed by the clerk, but not certified by him, with nothing upon it to show that it has ever been in the hands of the sheriff, cannot be regarded either as the original execution or a certified copy of it, and is not admissible to prove the amount of the judgment for costs. 393

21. Where a creditor files, as a claim against an insolvent estate, an account for goods, wares and merchandize furnished to the intestate, and money paid for him, by the firm of which the creditor is the survivor; and the administrator, for the purpose of reducing the amount of the account, proves that the said firm collected money belonging to the intestate, upon the understanding that, when collected, it should be placed to his credit, the creditor may rebut this proof, by introducing evidence of another item of indebtedness from the intestate to the said firm, to which the money collected by them might have been applied, under the general authority given them by the intestate.—Ross, Admr. v. Pearson..... 473

22. Although it is irregular to admit such rebutting proof before the administrator has offered the evidence which it is intended to rebut, yet its admission is not error, if the administrator admits that he will offer such evidence, and the record shows that it was subsequently introduced.... 473

23. When several plaintiffs join in an action of trespass to try titles, a deed conveying the land in controversy to some of them is admissible evidence for the grantees therein named; and therefore a motion to exclude it entirely may be refused.—Lindsay v. Hoke & Abernathy..... 542

24. *It seems*, that when land is conveyed by deed to a firm by their firm

name, the deed may be aided by parol proof showing the names of the particular individuals of which the partnership was composed..... 542
25. To show that a bill of sale to a slave is fraudulent, as being made to hinder and delay the vendor's creditors, a deed for land executed by him on the same day to the vendee, is admissible evidence, as tending to show that the vendor was disposing of his whole estate, and thus adding to the other proof of the *mala fides* of the bill of sale.—Dent v. Portwood..... 588
26. *It seems*, that parol proof is admissible to show that the writing on which the suit is founded, a conditional note, was signed by the maker with the distinct admission on the part of the payee that it did not contain the terms of their agreement, and the understanding that they should afterwards, at a convenient time, draw another instrument which would truly express the contract.—Hopper v. Eiland..... 714
27. In assumpsit to recover money over-paid by plaintiff to defendant, the fact of the over-payment being contested, defendant may show plaintiff's inability to make it; and for this purpose, an unsatisfied mortgage previously executed by plaintiff is admissible evidence, as a circumstance the weight of which must be determined by the jury.—Rutherford v. McIvor..... 750
28. Also, a letter written by plaintiff to defendant after the alleged over-payment was made, showing that plaintiff was at that time pressed for money, and that he had had an interview with defendant the day before it was written, respecting a sum of money which defendant was liable to pay, and claiming from him that sum only, is admissible evidence for defendant; but *it seems*, that the letter would be inadmissible, if written before the alleged over-payment was made..... 750
29. Parol evidence is admissible to identify a demand secured by a deed of trust, in which it is described as consisting of one note, when in fact it consisted of two notes; and the deed itself is admissible notwithstanding the misdescription, to show that the debt was secured by it.—Morrison v. Taylor..... 779
30. Where a note is given, payable "six months after date," "for value received," in consideration of the payees' agreement to perform certain services as attorneys at law for the maker, and no time is fixed for the performance of the services, parol evidence is inadmissible to show that the note was not to become payable until the contemplated services were rendered.—Walker v. Clay and Clay..... 797
31. When *non est factum* is pleaded to a declaration on a promissory note, and the defendant has introduced evidence tending to show that he was insane, "at, before and after the time of the execution of the note" by him, the plaintiff may rebut this evidence by proof of the defendant's condition *seventeen* days after its execution..... 797

EXCEPTIONS, BILL OF.

1. A bill of exceptions will be construed most strongly against the party excepting.—Andress v. Broughton..... 200
2. When the bill of exceptions sets out several distinct charges and refusals to charge on request, and concludes with the words, "to which defendant excepted," the exception will be construed to apply only to the charge and refusal contained in the paragraph immediately preceding it..... 200
3. When the court below charges the jury, that, if they believe all the

proof, the plaintiff is not entitled to recover, the plaintiff, wishing to revise the charge in the Appellate Court, must set out in the bill of exceptions all the evidence upon which it was predicated.—Barnes & Barnes v. Mobley..... 232

4. To authorize an appellate court to revise the decision of an inferior tribunal in relation to the admission or rejection of evidence, the bill of exceptions must show that such decision was excepted to during the trial of the case.—Croft v. Ferrell et al..... 351
5. Where the bill of exceptions, after reciting the ruling of the court on another point and the defendant's exception thereto, stated that the defendant then offered certain evidence, and concluded thus: "The court refused to receive the testimony as offered by defendant. The defendant prays the court to sign and seal this, his bill of exceptions to the ruling of the court, which the court now signs," &c. *It was held:*

That the bill of exceptions did not show that any exception was taken during the trial of the cause to the ruling of the court in excluding the testimony; and that the words of exception used in the conclusion of the bill must be construed to refer to the previous ruling of the court, to which the body of the bill showed that exception was taken..... 351

EXECUTION, WRIT OF.

1. Where a sheriff, having an execution in his hands, is referred by the defendant to a third person, from whom in settlement of it he takes his promissory note for the amount, and then returns the execution satisfied, the plaintiff may have the return set aside, as prejudicial to his rights; but the sheriff himself is bound by it, and can neither amend nor set it aside.—Holt v. Robinson..... 106
2. And in such case, a promissory note afterwards executed to the sheriff by the executor of the defendant, in consideration that the sheriff should not set aside or amend his return, and should pay the judgment himself, is without any legal consideration to support it..... 106
3. Nor does the circumstance that the executor, at the time of the execution of his note, had a full knowledge of all the facts, in any manner affect the validity of the note..... 106
4. The statute of this State, (Clay's Digest, 210, § 47.) which exempts from levy and sale one horse for the use of every family, can be invoked only by a person who *resides in this State*, and has a family.—Boykin v. Edwards..... 261
5. The statute of Mississippi which exempts one horse from levy and sale is a local act, and can only protect the property exempted so long as it remains within the limits of that State..... 261
6. When an execution is levied on a slave which is under mortgage or deed of trust executed by the defendant in execution, the sheriff has no authority to sell a greater interest than the defendant in execution has, viz: the right of possession until the law day of the mortgage or deed of trust, and the equity of redemption.—O'Neal et al. v. Wilson..... 288
7. An execution in the hands of the sheriff is not a lien upon the ungathered crop of the defendant.—Evans and Evans v. Lamar..... 333

EXECUTORS AND ADMINISTRATORS.

1. When the settlement of an estate has been removed from the Court of

Probate into the Court of Chancery, by a bill regularly filed, and the latter court has rightfully taken jurisdiction, and the defendant has answered the bill, and the cause is progressing in the equity forum, the administrator, pending such suit, proceeds in the Court of Probate at his peril, and is liable to have his acts reviewed; and any rights which he may acquire by reason of the action of the Court of Probate, may be divested by the Court of Chancery, if such rights in any wise conflict with, or embarrass the proper administration of the estate in equity.—Pearson v. Darrington, Admr. 169

2. Where the settlement of an administration is withdrawn from the Orphans' Court, by a bill filed in the Court of Chancery, and the cause is progressing in the latter court, it is competent for that court, if the exigencies of the estate require it, to direct, by interlocutory decree, a sale of the slaves belonging to the estate, for cash, at an unusual season of the year for selling such property, upon the petition of the administrators or of the creditors; and this, even before an accounting is had between the administrator and the complainants. 169

3. And if, in such case, the administrator invokes the aid of the Orphans' Court, and obtains an order of sale, and purchases the slaves sold for himself, it is the duty of the Court of Chancery, to provide that the slaves so purchased by him shall be forthcoming to abide the final decree in the cause. 169

4. If an administrator, pending a suit in equity for the settlement of the estate, pays demands against the estate, and seeks to indemnify himself, by selling the property, under an order of the Orphans' Court, and purchasing it himself; or, if he has extinguished demands by giving his individual obligations, which have been reduced to judgments, and he seeks, by a purchase of the property, to invest himself with the title, so as to make it subject to levy; in either event, the Court of Chancery will hold the property subject to its control, to abide whatever decision the justice and equity of the case may require to be made on the final hearing. 169

5. An executor is bound to include in his inventory of assets a debt due from himself to his testator.—Weems, Exr. v. Brynn & Wife. 302

6. Whether an executor or administrator in chief who has settled with the administrator *de bonis non*, may apply to the Court of Probate for a discharge from liability to the estate, *quære?* But conceding that he may, he should give notice of his intended application, produce his receipt showing the settlement, and move for a discharge; the court cannot, *ex mero motu*, order his discharge, upon the mere representation of the administrator *de bonis non*, upon his final settlement, that he has settled in full with the executor or administrator in chief.—King v. Collins, Admr. 363

7. Where a testator devises and bequeaths to his children a certain portion of his real estate and all of his personal estate, "to be distributed when required, at mature age or majority, in equal parts," the authority to make distribution confers upon the executor a naked power merely, uncoupled with any interest, and, in the absence of a devise to him or words of implication, gives him no right to the possession or control of the lands.—Chighizola v. Le Baron, Exr. 406

8. The statutes of this State authorizing an executor to sell or rent the lands of the testator do not, of themselves, intercept the passing of the estate to

the heirs or devisees, who may assert their title, with all its incidents, until the executor exerts the power reposed in him by the statute..... 406
9. The power to rent, conferred by statute upon the executor, is a bare authority, and must be strictly pursued; and if the lands are not leased at public outcry, according to the requisitions of the statute, it cannot be regarded as a due execution of the power, and does not in any manner affect the rights of the devisees..... 406
10. The statute authorizing "any person entitled to a legacy or any estate by will," to proceed against the executor after the lapse of eighteen months, (Clay's Digest, 196, §§ 23, 24,) was not intended to apply to devises of which the executor had no control, and in relation to which he had exercised none of the powers conferred on him by law; and in such case the executor cannot, under the statute, be held responsible in his representative character for the rents or possession of the land, the subject of such devise..... 406
11. When an executor, in his answer to a citation requiring him to make distribution and a final settlement, alleges "that suits are pending against him as executor," but does not give any statement or description of them, nor refer to any record or schedule of them, the answer is insufficient, and demurrable for that reason..... 406
12. The proper practice, however, in such case, would be, to raise the objection by exceptions to the answer, rather than by demurrer..... 406
13. An administrator *de bonis non* is only entitled to the assets of the testator or intestate which remain in specie, unadministered by the executor or administrator in chief—Abney, Admrx. v. Pickett..... 739

FRAUD, AND FRAUDULENT CONVEYANCES.

1. Fraud will not be presumed, when the facts out of which it is supposed to arise, may well consist with honesty and pure intention.—Smith's Heirs v. Branch Bank at Mobile..... 125
2. A conveyance executed by an insolvent to one of his creditors, absolute on its face, but accompanied by a contemporaneous parol agreement that it should operate only for the grantee's indemnity, is fraudulent and void as to the other creditors of the grantor, and will be set aside in equity.—Bryant v. Young, Hall et al..... 264
3. If the land has been sold by the grantee to a *bona fide* purchaser for a valuable consideration, who is not made a party to the bill filed by the creditors of the grantor, the land itself cannot be subjected to the complainant's demand..... 264
4. But the proceeds of the sale in the hands of the fraudulent grantee may be subjected, and so far as any portion of the same can be traced into other property purchased or exchanged by him, a court of equity will fasten a trust upon it in favor of the creditors..... 264
5. A deed conveying property absolutely to the trustee for the payment of certain specified debts of the grantor, which contains no reservation or stipulation of any benefit to the grantor, and imposes no condition prejudicial to, or restrictive of the rights of the secured creditors, or tending to delay them in the collection of their debts, is not fraudulent on its face, although it gives the trustee a discretion as to the time and manner of selling the crops conveyed by it; if the trustee, in such case, refuse to act promptly, or within a reasonable time, the secured creditors might com-

pel him in equity to do so, or have him displaced and another appointed.—Evans and Evans v. Lamar..... 333
6. To show that a bill of sale to a slave is fraudulent, as being made to hinder and delay the vendor's creditors, a deed for land executed by him on the same day to the vendee, is admissible evidence, as tending to show that the vendor was disposing of his whole estate, and thus adding to the other proof of the *mala fides* of the bill of sale.—Dent v. Portwood.... 588
7. The payment of sixty-five dollars for a slave is a valuable consideration, and entitles the purchaser to the property as against one claiming under a voluntary fraudulent sale previously made..... 588
8. A deed of assignment fraudulent on its face as to creditors, is capable of confirmation by them; and after the deed has been executed, and the assenting creditors have been paid from the effects assigned, the transaction, as to them, will not be disturbed.—White v. Banks..... 705
9. A voluntary deed, made to hinder, delay and defraud creditors, may be avoided in a court of law, by a creditor of the grantor's or a *bona fide* purchaser for a valuable consideration.—Stokes v. Jones..... 731
10. When the question is one of fraudulent intention in the execution of the deed, the court cannot pass upon the effect of the testimony, but must leave the question of fraud *vel non* to the decision of the jury; but when the bill of exceptions recites, that "it was expressly proved that the conveyance to the plaintiff was made to delay, hinder and defraud the grantor's then existing creditors," and that there was no conflict in the proof, it is not error to charge the jury, "that, if they believe all the evidence, they must find for the defendant."..... 731
11. A voluntary conveyance, with covenants of warranty, of lands in which, at the time of its execution, the grantor had not such an interest as could be subjected by his creditors either in law or equity, but to which he afterwards acquired title, is void as to creditors and subsequent *bona fide* purchasers, if made to hinder, delay and defraud the grantor's creditors; a voluntary fraudulent estoppel is impotent to defeat the just claims of creditors and *bona fide* purchasers..... 731
12. Where a voluntary conveyance from father to son, made to hinder, delay and defraud the grantor's creditors, contains a condition that the grantor shall, during his life, remain with the grantee and be supported by him, and the grantee at the time of its execution is an infant of tender years, and does not accept or in any way bind himself to the performance of the condition until after the sale by the grantor to a *bona fide* purchaser for a valuable consideration, his subsequent acceptance and part performance of the condition cannot relate back so as to defeat the intervening sale to the *bona fide* purchaser..... 731

FRAUDS. STATUTE OF.

1. Where one claims title to personal property under the second section of the statute of frauds, (Clay's Digest 255,) on the ground of his vendor's possession by way of loan not reduced to writing and recorded, he must show that his vendor, or those through whom his vendor claims, have had possession of the property for three years.—Brainard v. McDevitt..... 119
2. If his purchase was before the three years were complete, he cannot add his own possession to that of his vendor, in order to claim the benefit of the act; he must acquire title at the date of his purchase, or the act gives

him none..... 119

3. A promise to pay the debt of another, if reduced to writing and founded on a sufficient legal consideration, is binding, whether the consideration be a benefit to the promisor or a prejudice to the promisee; but if the promise is not reduced to writing, it is void, unless founded on some new consideration beneficial to the promisor.—Martin v. Black's Ex'rs..... 721
4. A verbal promise by defendant, to pay a debt against the estate of her deceased son, if the attorney who had the debt for collection would also act as her attorney, in having the administrator of the estate removed and herself appointed administratrix *de bonis non*, is void within the statute of frauds, it being shown that the attorney charged her for his said services, and that she had paid him..... 721

HUSBAND AND WIFE.

1. On the distribution of an estate in which the wife is interested, the decree for her distributive share should be in the name of husband and wife, for the use of the wife.—Roberson's Heirs v. Roberson's Executors..... 273
2. Where the fee of lands was in the wife by inheritance, the deed of husband and wife, acknowledged in the ordinary form, would not, previously to the passage of the act of 1848, pass the fee to her grantee; her title could only be conveyed by deed acknowledged by her on private examination.—Doe ex dem. Hughes v. Wilkinson..... 296
3. Husband and wife, by deed dated May 16, 1839, conveyed lands belonging to the wife in fee simple by inheritance, and the certificate of acknowledgement appended to the deed recited, that, "on the 16th and 17th day of May, 1839," they "both personally appeared," &c., and "acknowledged the above instrument to be their free act and deed." The wife also executed a conveyance, dated May, 17, 1839, and written on the back of the said deed, by which she remised, released, relinquished and forever quitclaimed, to the said grantee, all right, title, interest and claim to dower, which she then had as wife of the said grantor, or might thereafter have as his widow, to the lands and premises conveyed; and at the foot of this instrument, was written the certificate of a justice of the peace, that, on said 17th May, 1839, on private examination, separate and apart from her husband, "she acknowledged that she signed, sealed, and delivered *the foregoing instrument*, as her voluntary act and deed," &c. *Held:*
   That the last certificate applied only to the conveyance immediately preceding it, and did not extend to the deed executed by husband and wife; and that, upon her death, if she survived him, or upon his death, if he survived her, the fee vested in her heirs at law, and they could immediately assert it against the tenant in possession..... 296
4. Where a feme sole, one of several co-plaintiffs, marries, pending the suit, and her husband is not made a party, the objection, if it can avail in any case, must be taken by plea in abatement.—Powell v. Glenn et al..... 458
5. At law, where the title to property has vested in the husband, as in case of a gift or bequest to the wife, no contract which he may afterwards make directly with her, and *a fortiori* no declaration or admission made by him during coverture, can vest the property in the wife, so as to enable her to maintain or resist an action by or against his personal representative.—Frierson v. Frierson..... 549

See SEPARATE ESTATES OF MARRIED WOMEN.

INDIAN RESERVATIONS.

1. A female belonging to the Creek tribe of Indians, whose husband was dead, but with whom a grand-child resided, whose parents were also dead, is "the head of a family" within the meaning of the second article of the treaty of March 24, 1832, between the United States and that tribe of Indians.—Rowland and Heifner v. Ladiga's Heirs 9
2. Every head of a family of that tribe who resided on a half section of land, and selected it as his reservation under the treaty, became thereby entitled to it; and his right could not be divested by the refusal of the locating agent to locate him upon it 9
3. The head of a family who made his selection, and was located upon his reservation, could only be divested of his right within five years, by a sale in accordance with the provisions of the treaty, or by abandoning the land; but if he neither sold or abandoned it within that time, his title became perfect and indefeasible 9
4. Where an Indian reservee, the head of a family, made application to the locating agent to be located on her reservation, which application was improperly refused, and she continued to reside on the land until interrupted in her possession by intruders, and then went to a relative's to reside, this is not an abandonment of the land, notwithstanding she is afterwards removed from the country by the force of the Government 9
5. The right of an Indian reservee, which he has not conveyed by sale, nor lost by abandonment, descends to his heirs at law 9
6. In ejectment, plaintiff claimed under a purchase at execution sale, and proved that the land was devised to the defendant in execution by his father, who had held possession under a bond for titles from one Y., and had payed the purchase money in full; defendant relied upon a contract for the purchase of the land from an Indian reservee, under the treaty of March 24, 1832, approved November 1, 1834, mesne conveyances from the grantees to said Y., and from him to one H. *Held:*
That the outstanding legal title shown by defendant was superior to plaintiff's.—Doe ex dem. Stevens v. King 429

INDICTMENT.

See CRIMINAL LAW.

INFANTS.

1. When an infant is interested in the settlement of an estate before the Court of Probate, it is the duty of the court to appoint a guardian *ad litem* for her, although she may have a guardian of her person and property regularly appointed, who was notified of the settlement, and failed to attend. (Overruling Parks v. Stonum, 8 Ala. 755.)—King v. Collins, Adm'r ... 363
2. An infant may be sued for his *torts*, irrespective of the form of action which the law prescribes for the redress of the wrong done.—Oliver v. McClellan 675
3. The fact that a minor is "in the habit of trading on his own account, and working about in the neighborhood, controlling the proceeds of his own labor," does not operate as a forfeiture of that protection which the law throws around him, when it forbids his being sued except in particular cases 675
4. When the record of the final settlement of an estate recites, that the guar-

dian of the minor heirs appeared and claimed for them a distributive share, the recital is conclusive as to the fact of the appearance of the minors by their guardian, and such appearance would dispense with the necessity of notice.—Smith v. Smith's Admrs. 761

5. When infants are interested in the distribution of an estate, they may be represented on the final settlement by their general guardian, unless he is an incompetent or unfit person. 761

INJUNCTIONS.

1. The statute which limits appeals from an interlocutory decree dissolving an injunction, "*to the next term* of the Supreme Court," means, *the next term to which an appeal may be taken according to the general law regulating appeals.*—Pearson v. Darrington, Adm'r. 169

2. Such appeals are, in other respects, subject to the same rules which govern appeals in other cases, and unless the decree is rendered a sufficient length of time before the commencement of the first term of the Supreme Court, to enable the appellants to give the citation required by the statute in cases of appeals and writ of error, the appeal is properly returnable to the next term of the court to which it may be returned, allowing to the appellants time to give the required notice. 169

3. When the regular term of the Chancery Court commenced on the first Monday in December, and was limited to one week, and a cause was submitted on a motion to dissolve an injunction, with the agreement of the counsel that the Chancellor should render his decree in vacation as of that term, and a decree dissolving the injunction was afterwards rendered, dated the 3d of January, but not filed in the office of the register until the 10th of January, *Held:*

That an appeal from this decree was properly taken to the next June term of the Supreme Court. 169

INSOLVENT ESTATES.

1. An objection to a claim against an insolvent estate, that it was not filed within six months after the decree of insolvency, may be made at any time before the hearing, or at the hearing.—Bartol v. Calvert, Admr. 42

2. Objections going to the verification of a claim, or to its correctness or validity, must be filed within nine months after the decree of insolvency.. 42

3. Objections to the time of filing a claim are properly triable by the court. 42

4. The term "month," as used in the act of 1843 regulating the proceedings on the settlement of insolvent estates, means a *calendar*, and not a *lunar* month 42

5. Where a claim against an insolvent estate is rejected, on the ground that it was not properly verified, or was not filed in time, and in consequence of its rejection a surplus is left in the hands of the administrator, such surplus should be appropriated to the creditor, if his claim is not barred on some other ground, in preference to the distributees. 42

6. A judgment rejecting a claim against an insolvent estate, under the act of 1843, is a final judgment which will support a writ of error, although no issue is made up under the act. 42

7. When a claim against an insolvent estate is filed within six months after the rendition of the decree of insolvency, all objections to its allowance on final settlement must be filed in writing, by the administrator or some

creditor, within three months after the expiration of the time allowed for filing claims, or, in other words, within nine months from the date of the decree of insolvency.—Gaffney v. Williamson's Admr..... 112
8. When a claim is filed in time, but not verified by affidavit, and an objection to it in writing, because it is not so verified, is filed in time, the affidavit may be supplied at any time before, or at the day set for final settlement of the estate..... 112
9. Yet if a claim is filed in time, and not verified by affidavit, and no objection to its allowance is filed in time, then no objection against its allowance can be heard on final settlement, for an insufficient verification by affidavit, the want of an affidavit, or any other cause..... 112
10. The objection that a claim was not filed in time may be raised by the administrator or any creditor, even at the hearing..... 112
11. When a claim against an insolvent estate is filed on the same day on which the decree of insolvency is rendered, the Appellate Court will presume, in the absence of other proof, that it was filed *after* the rendition of the decree..... 112
12. No exceptions can be taken to a claim properly filed against an insolvent estate, going to the affidavit or to the claim itself, unless they are filed within the time prescribed by the act of 1843: but objections extending to the time of filing may be made at any time.—Hogan's Exr. v. Calvert, Admr..... 194
13. A claim against an insolvent estate is not required to be in any particular form: it is sufficient if it shows the liability of the estate to the party asserting it..... 194
14. A party having merely an equitable title to a demand against an insolvent estate may file it as a claim against the estate..... 194
15. The case of Ross (Creditor) v. Ross (Admr.), 20 Ala. 105, re-affirmed.—Ross (Creditor) v. Ross (Admr.)..... 322

INTENDMENTS AND LEGAL PRESUMPTIONS.

1. The doctrine of relation back to a past time is a fiction which is often indulged, in advancement of justice, to sustain legal proceedings; but it is never resorted to, when the result would be, to deprive a party of a clear legal right, or when it would work manifest injustice.—Pearson v. Darrington, Admr..... 169
2. When the defendant in trover fails to give any account of the manner in which he acquired possession of the slave in controversy, he will be presumed, in the absence of all rebutting proof, to hold from or under the person who is shown to have had the possession for several years next before the defendant acquired it.—Barnes & Barnes v. Mobley..... 232
3. The fact that the items of an account are not charged in the order of their dates, if it could operate at all, would not necessarily raise any legal presumption against the correctness of the account, but, at the most, would be a circumstance whose weight must be determined by the jury.—Ross, Admr. v. Pearson..... 473

JUDGMENTS AND DECREES.

1. A judgment rejecting a claim against an insolvent estate, under the act of 1843, is a final judgment which will support a writ of error, although no issue is made up under the act.—Bartol v. Calvert, Admr..... 42

2. When a judgment is recovered against the surviving partners on a firm debt, and the amount of the judgment is afterwards paid to the plaintiff by a stranger, with money furnished him for that purpose by one of the defendants and the executor of the deceased partner, the judgment is satisfied, and it cannot be kept alive, by assignment to such third person, for the purpose of enforcing the collection of it from the other defendant. Hogan v. Reynolds..... 56
3. A final decree of settlement should be definitive as to all the liabilities of the executor to the estate, and should award distribution of the entire fund in his hands, having all the distributees before it.—Rhodes, Exr. v. Turner and Wife..... 210
4. A decree rendered by the Orphans' Court, upon the application of an executor, by which an amount is ascertained to be in his hands, a portion of which he is ordered to pay over to those entitled to it, and to retain the balance until the further order of the court, is not a final decree; but it may well be regarded as an interlocutory decree, and, being *prima facie* correct, unless impeached for errors or mistakes, may be made the basis of a final decree..... 210
5. A judgment that has been reversed, is a mere nullity.—Price v. Simmons, Admr..... 337
6. A judgment rendered by the Court of Probate under the bastardy act, though not in favor of any person by name as plaintiff, is nevertheless sufficient, since the statute points out with certainty who is the plaintiff. —Seale v. M'Clannahan..... 345
7. A judgment *nisi* against a defaulting garnishee, for "the sum of sixty-three dollars debt, and twenty-six dollars and seventy-six cents damages, with interest thereon from the second day of October, 1848," is sufficiently certain.—Drane v. King & Devitt..... 556
8. Where judgment final is rendered for a larger amount than the judgment *nisi*, the discrepancy can only be considered a clerical misprision, and the judgment will be amended in the Appellate Court, at the costs of the plaintiff in error..... 556

JUDICIAL SALES.

1. When an execution is levied on a slave which is under mortgage or deed of trust executed by the defendant in execution, the sheriff has no authority to sell a greater interest than the defendant in execution has, viz: the right of possession until the law day of the mortgage or deed of trust, and the equity of redemption.—O'Neal et al. v. Wilson..... 288
2. The execution creditor has the right, under the statute, to pay off the debts secured by the deed of trust, and to be substituted to the rights of the beneficiaries; and in such case the trustee would be compelled to execute the trust for him in the same manner. But if the sheriff assumes the responsibility of closing the trust, by selling the entire property in the slave, and declaring that the proceeds of sale will be applied first to the payment of the debts secured by the deed, and the surplus to the satisfaction of the execution, his sale does not divest the title of the trustee, but only transfers to the purchaser the interest of the defendant in execution..... 288
3. The doctrine of "*caveat emptor*" applies to sales under execution, where the sheriff attempts to sell a greater interest than the defendant has; and

although a court of equity will sometimes interfere in peculiar cases, to prevent fraud, or relieve against mistakes, yet it will not interpose to relieve a purchaser from the consequences of his own folly or temerity, when he purchased with knowledge that the property was under deed of trust, and after the sale had been forbidden by the trustee..... 288

4. A plaintiff claiming under execution sale takes only the title which the defendant in the execution had; and although that may have been such a legal title as was subject to levy and sale, yet the defendant may defend by showing a superior legal title outstanding in another.—Doe ex dem. Stevens v. King..... 429

5. Although every inadequacy of price will not be sufficient to set aside a sale of lands made under execution, yet, when the inadequacy is so gross as, at once, to shock the understanding and conscience of an honest and just man, it will, of itself, authorize the court to set aside the sale.—Henderson et al. v. Sublett et al..... 626

6. In all such cases, the sheriff should not proceed with the sale, but should return the *fi. fa.* stating the levy and that the property was not sold for want of buyers, and wait for a *venditioni exponas*..... 626

7. Any person who is a party to the suit, or connected with the title to the lands sold, whether his interest be legal or equitable, may be heard on a motion to set aside the sale for inadequacy of price..... 626

8. A court will never permit its process to be improperly used, to work injustice or oppression; but if such use be made of it, the court will, by virtue of its power over its officers, suitors and counsel, rectify the abuse, and restore to the injured party that of which he has been deprived by their fraud, negligence or misconduct.—Lankford v. Jackson et al..... 650

9. The sheriff should not sell property levied on under *fi. fa.* for a merely nominal sum, (as where land worth $1000 was sold for $6,) but should retain the levy and return the *fi. fa.*, stating the facts; but if he disregards his duty and sells the land for a nominal price, the court, on timely application, will set aside the sale..... 650

10. When lands sold under execution are purchased and held by the trustee of a *feme covert* in trust for her, an offer by a judgment creditor to redeem under the statute, is sufficient, if made to the trustee.—Barringer et al. v. Burke..... 765

11. An offer to redeem by a creditor who has a judgment then in force, which is afterwards reversed on error by the Appellate Court, does not entitle him to redeem under another judgment recovered on the same cause of action after the expiration of the two years..... 765

JURISDICTION.

1. Under the act of February 11, 1850, (Pamphlet Acts, 34,) which abolished the County Courts, the Circuit Court has jurisdiction of a motion against a sheriff for failing to pay over money collected on an execution which was issued from the County Court before its abolition.—Kavanaugh v. State Bank..... 563

2. A justice of the peace has no jurisdiction to render judgment for costs against the defendant in the preliminary proceedings had before him upon a charge of felony.—Sasnett v. Weathers et al..... 673

3. Any judgment or decree of any court, which shows upon its face a want of jurisdiction, either of the subject matter or of the parties, is not mere-

ly voidable, but void.—Lamar v. Comm'rs' Court of Marshall County.. 772

JUSTICES OF THE PEACE.

1. Justices of the peace had no admiralty jurisdiction previous to the act of 1836, (Clay's Digest, 139,)—Sch. Louisiana v. Fettyplace, Goodman & Co. 286
2. The act of 1841, which was designed to remove all doubts as to the construction of the act of 1836, confers upon justices of the peace the same admiralty jurisdiction when the sum claimed is less than fifty dollars, that was given by the act of 1836 to the Circuit and County Courts when the sum claimed was over fifty dollars; and that jurisdiction is confined to demands which arise from "furnishing materials, labor or stores, for the use of any steamboat or other water-craft."..... 286
3. A justice of the peace has no jurisdiction to render judgment for costs against the defendant in the preliminary proceedings had before him upon a charge of felony.—Sasnett v. Weathers et al..... 673

See Appeals and Certiorari.

LIMITATIONS, STATUTE OF.

1. The right to enjoin, by bill in equity, a judgment at law founded on a note given for a gaming consideration, is not limited by the analogy between such a bill and a bill of review, to three years from the date of the judgment.—Paulding v. Watson and Eidson..... 279
2. An attorney at law may interpose the plea of the statute of limitations, when sued by his client for money which he has collected as attorney, and failed to pay over.—Kimbro v. Waller..... 376
3. In assumpsit against an attorney at law for money collected as attorney and not paid over, defendant pleaded the statute of limitations, to which plaintiff replied "that the money sued for was collected by defendant, as an attorney at law, in the State of Tennessee, and that no demand was made of him for said money until a short time before the commencement of this suit, and that the statute only began to run from the demand." *Held:*
That the replication was demurrable..... 376
4. In all cases of concurrent jurisdiction, statutes of limitations are equally as obligatory in courts of equity as in courts of common law; and in many cases, mere lapse of time and the staleness of the claim will constitute a defence in equity, when the statute does not apply.—Gunn v. Brantley. 633
5. The statute of limitations does not bar a married woman from recovering her separate property, sold under execution against her husband, when her title accrued during coverture.—Michan and Wife v. Wyatt..... 815

See Chancery Pleading and Practice, 32, 33, 34.
" Estates of Deceased Persons, 5, 6.

LUNATICS, IDIOTS, &c.

1. The Orphans' Court has no jurisdiction to declare a person a lunatic, or *non compos mentis*, and to appoint a guardian for him as such, without the issue of a writ *de lunatico inquirendo*, and the finding of a jury thereon; and if a guardian is appointed for a person, as being *non compos mentis*, without these preliminary proceedings, the appointment is void, and may be impeached in any court, in a collateral proceeding in which a party seeks a benefit under it.—Eslava et al. v. Lepretre..... 504

2. A party is entitled to notice of proceedings against him in the Orphans' Court, to declare him *non compos mentis*, and to appoint a guardian for him; and the appointment is void, if made without notice..... 504
3. Where a bill is filed to foreclose two mortgages on land, one executed by the mortgagor and his wife jointly, and the other by the mortgagor and the wife's guardians, who were irregularly appointed by the Orphans' Court, without the issue of a writ *de lunatico inquirendo*, upon the mere petition of her husband, alleging that she was *non compos mentis;* and the guardians are made parties to the bill, but the wife is not—it is error, to proceed to a final decree, until the wife is properly brought in; nor can the complainant excuse his neglect in failing to proceed regularly against her, by setting up her want of interest in the mortgaged property; nor is the error cured by the subsequent appointment of a guardian *ad litem* for her..... 504
4. When *non est factum* is pleaded to a declaration on a promissory note, and the defendant has introduced evidence tending to show that he was insane, "at, before and after the time of the execution of the note" by him, the plaintiff may rebut this evidence by proof of the defendant's condition *seventeen* days after its execution.—Walker v. Clay & Clay... 797
5. The appointment by the court of a guardian *ad litem* for a lunatic defendant, is not error, when the record shows that the defendant appeared and pleaded "by his guardian *ad litem* and by attorney;" especially, when the record indicates that the guardian was appointed at the instance of the defendant's attorney..... 797
6. In a suit against a lunatic, the judgment is properly rendered against the lunatic himself, and not against his guardian..... 797

MALICIOUS PROSECUTION.

1. In actions for malicious prosecution, two things are essential to be established by the plaintiff: first, the absence of all *probable cause* for such a prosecution on the part of the defendant; and secondly, that the prosecution was malicious.—Ewing v. Sanford..... 157
2. The defendant may successfully defend, by showing either that there was probable cause for the prosecution, or, admitting that there was not probable cause, that he had not been actuated by what the law terms malice. 157
3. No matter how far a man may be impelled by malice, in prosecuting another on a criminal charge, the law, from motives of public policy, will hold him harmless, when sued for a malicious prosecution, provided he can show probable cause..... 157
4. On the other hand, if he cannot show probable cause, the law will imply malice from the absence of probable cause, unless he can show, by way of repelling this implication, that such facts and circumstances existed, as, although not amounting to probable cause, were calculated to produce at the time, in the mind of a prudent and reasonable man, a well grounded belief or suspicion of the party's guilt; and that he was not, therefore, actuated by malice, in commencing the prosecution..... 157
5. E. prosecuted S. for stealing a slave, which S. afterwards recovered from E. in an action at law; and after the termination of the prosecution, S. brought an action on the case for malicious prosecution against E. *It was held:*
That the record of the suit for the recovery of the slave was admissible evidence for the plaintiff..... 157

MANDAMUS.

1. On motion for *mandamus*, the return which is made to the alternative writ is not required to be verified by the oath of the party; it is taken as true by the court, and, in the absence of any statute providing for traversing the return, the party injured must proceed for the false return, and if it be found false by the jury, he recovers damages equivalent to the injury sustained, together with a peremptory *mandamus* to the defendant to do his duty.—Commrs.' Court of Tallapoosa v. Tarver..... 661
2. The statute allowing the defendant to plead as many matters as he thinks necessary to his defence, applies to proceedings by *mandamus*, as well as to other causes at law..... 661
3. The statute of Anne ch. 20, which allows the facts stated in the return to the alternative writ in case of *mandamus* to be traversed and tried by a jury, not being in force in this State, the facts must be pleaded with such a degree of certainty, as to enable the court to decide whether they are in law sufficient to justify the party in failing to do the act..... 661
4. *Mandamus*, when directed to an inferior tribunal, is a writ which seeks to compel action; but it does not point out to that court how it shall act in a matter over which it has a discretionary power of decision. *Certiorari*, on the other hand, is a writ revisatory in its nature, and is issued for the purpose of enabling the superior court to correct the erroneous action of the inferior.—Lamar v. Commrs.' Court of Marshall County..... 772

MARRIED WOMEN, SEPARATE ESTATES OF.

1. On the distribution of an estate in which the wife is interested, the decree for her distributive share should be in the name of husband and wife, for the use of the wife.—Roberson's Heirs v. Roberson's Executors..... 273
2. Since the passage of the acts of 1848 and 1850, the husband is entitled, as income, to the money accruing during coverture from the hire of the wife's slaves and the rent of her land.—Weems, Exr. v. Bryan & Wife.. 302
3. The husband, who is executor of his wife, may be compelled to settle his trusteeship of her separate estate in the Court of Probate; and on this settlement, he should state with that court a full account of all moneys or other property of the wife, received by him as *corpus* or *capital* of her estate, and not as *income*, and credit himself with all proper payments or disbursements, made by him in her behalf as trustee..... 302
4. Under the act of 1850, the husband becomes tenant for the life of the wife of the rents and profits of her estate, and, like any other tenant for life, he is entitled to *emblements*, that is, the crop growing or matured, whether gathered or not, at the termination of the life estate..... 302
5. A deed of trust executed by a woman in contemplation of marriage, conveying all her property, consisting of bonds and mortgages, to a trustee, "to have and to hold," &c., "in trust for and during the joint lives of herself and her intended husband, "to and for their joint use, benefit and behoof, and to suffer and to permit them to have, take and receive the issue, income, interest and profits arising from the said bonds and mortgages, to and for their joint use and benefit, without being in any manner subject to the debts, contracts or control of" her husband, does not exclude the marital rights of her husband, but the property may be taken in execution at law for his debts.—Geyer, Trustee, v. Br. B'k. at Mobile.. 414
6. Where a bill is in form the bill of husband and wife, yet, in substance and

fact, it only concerns the separate estate of the wife, and seeks only to establish her rights and protect her interests, and asks no relief for or against the husband, he will be regarded as her next friend or trustee, and the decree rendered will be conclusive on the wife.—Michan and Wife v. Wyatt..... 813

7. But if the bill seeks for relief either for or against the husband, the Chancellor should order it to stand over, until it can be reconstructed, so as to make the husband a defendant, and interpose a next friend to prosecute for the wife; and this, whether the objection be made by demurrer, plea, answer or for the first time at the hearing; but in the last case, it is left to the sound discretion of the Chancellor, whether he will allow it, or dismiss the bill without prejudice to the wife..... 813

8. A transcript of the record of a judgment against the husband, is not admissible evidence against the wife under a bill filed, in the name of the husband and wife, concerning her separate estate..... 813

9. The statute of limitations does not bar a married woman from recovering her separate property, sold under execution against her husband, when her title accrued during coverture..... 813

MORTGAGES

1. The grantee of a deed, which is absolute on its face, may come into a court of equity to have it declared a mortgage.—Bryan and McPhail v. Cowart..... 92

2. An agreement that a deed absolute on its face should operate only as a mortgage, must be contemporaneous with the execution of the deed itself; otherwise, unless supported by some new consideration, it is *nudum pactum*, and no right can arise under it..... 92

3. In ascertaining whether an absolute deed was intended as a mortgage or a conditional sale, parol proof of the intention of the parties at the time of its execution may be received..... 92

4. The proof must be clear and convincing, to enable the court to declare an absolute deed a mortgage. Loose declarations of a trust, especially after great lapse of time, will not be allowed to overturn or affect the written contract of the parties..... 92

5. An unrecorded mortgage is valid and binding between the parties themselves; it is also valid as to all subsequent creditors and purchasers with notice of its existence.—Smith's Heirs v. Br. B'k. at Mobile..... 125

6. If the mortgagor sells the land to an innocent *bona fide* purchaser, taking from him a mortgage to secure the purchase money, upon which he obtains a decree of sale in a foreclosure suit, at which *he*, by himself or his agent, becomes the purchaser, he is not in a condition to invoke the protection afforded to a *bona fide* purchaser without notice, so as to defeat the mortgage which he has executed to his vendor: for this would be, to take advantage of his own wrong..... 125

7. A. sold and conveyed to B., and took from him a mortgage to secure the purchase money, which was not recorded within sixty days; B. afterwards sold and conveyed to C., and also took from him a mortgage to secure the purchase money; B. foreclosed his mortgage, and obtained a decree of sale, at which sale he himself became the purchaser by an agent, and afterwards by a quit claim deed released all his interest to D., who had no actual notice of A.'s unrecorded mortgage. *Held:*

That, as against A., the release only operated to pass B.'s equity of redemption..... 125
8. The fourth head-note to the case of the Ohio Life Insurance and Trust Co. v. Ledyard, (8 Ala. Rep. 866,) corrected and limited..... 125
9. When an execution is levied on a slave which is under mortgage or deed of trust executed by the defendant in execution, the sheriff has no authority to sell a greater interest than the defendant in execution has, viz: the right of possession until the law day of the mortgage or deed of trust, and the equity of redemption.—O'Neal et al. v. Wilson..... 288
10. A written instrument in the following form, viz: "This day received of R. two hundred and twenty dollars, for the payment of which by the 25th Dec'r. next, I hereby assign over to said R. the free and full title to a certain negro girl named Hulda," is a mortgage of the slave, and not a bill of sale.—Ross v. Ross..... 322
11. In the absence of an express stipulation to the contrary, the mortgagor is entitled to retain possession of the mortgaged property until the law day, and he has the right to vindicate this possession against all persons who unlawfully withhold it; it is also his duty to look after the property, and if a loss occurs in consequence of the negligence of any one in looking after it, the loss must fall upon the party primarily guilty of the negligence, viz: the mortgagor..... 322
12. The assignment of the note or bond which a mortgage is intended to secure, unless there is some contract to the contrary, is an *equitable* assignment of the mortgage; and the assignee of the note or bond may use the name of the mortgagee, to enforce the mortgage at law.—Graham & Rogers v. Newman..... 497
13. But if the mortgage itself is assigned in proper form, the *legal title* of the mortgagee passes to his assignee, and in any proceeding at law to enforce the mortgage the latter must use his own name..... 497
14. If the mortgage is of land, there must be a deed from the mortgagee to the assignee, to convey the legal title to the premises, either on a separate paper, or endorsed on the mortgage with suitable words to convey the thing itself..... 497
15. But if the mortgage is of a personal chattel, the legal title will pass by the mortgagee's assignment of "all right, title and interest, in and to the within mortgage," endorsed upon the mortgage itself; and the assignee must sue in his own name to recover the chattel..... 497
16. In a foreclosure suit, if the defendants, being adults, do not suggest to the court that the mortgaged premises greatly exceed in value the amount of the mortgage debt and are capable of sub division, and move for a reference to the master to ascertain these facts, the Chancellor may well go on, and decree a sale of the whole of the mortgaged premises; and this, notwithstanding there are two mortgages, between the same parties, for the same debt, and differing only as to the premises conveyed.—Eslava v. Lepretre..... 504
17. But a different rule would prevail, if any of the defendants were infants, persons *non compotes mentis*, or under any other legal disability which would prevent them from appearing, and contesting the matter with the complainant..... 504
18. It is discretionary with the Chancellor to allow time for the payment of the sum reported by the master to be due on the mortgage debt; he may

decree a foreclosure and sale absolutely, without giving day to the mortgagor, and such decree will be free from error..... 504

19. A wife is not entitled, as against the mortgagee, to dower in lands which are conveyed to her husband, and by him on the same day mortgaged to his vendor, to secure the payment of the purchase money..... 504

20. An agreement between mortgagor and mortgagee, made contemporaneously with the loan, that the interest shall be converted into principal as it becomes due, is oppressive, unjust and tending to usury, and cannot be supported in equity; but after interest has accrued, it then becomes a debt, and may, by subsequent agreement, be considered a part of the principal, and thenceforth bear interest, provided, there is no extortion on the part of the mortgagee..... 504

21. If the interest runs in arrear, and rests are made from time to time in the mortgagee's account of arrears, on which interest is calculated, and finally a general account of all arrears is had, calculated on the footing of the previous rests, which is signed by the mortgagor, and secured by a second deed of mortgage, although executed after the lapse of several years, the transactions are not usurious; and equity will charge the mortgaged premises with the payment of the sum so found due, where there is no conflicting lien, or subsequent incumbrance on the property, at the time of this settlement..... 504

22. Where the mortgage debt is created in this State, and the mortgagor, being unable to pay it, afterwards agrees to pay ten per cent. interest, as an indemnity to the mortgagee for interest paid by him on money borrowed in Louisiana, at a higher rate of interest than is allowed by the laws of this State, the agreement is oppressive and unjust, and will not be upheld in a court of chancery..... 504

23. If a mistake is made upon a general accounting between mortgagor and mortgagee of all arrears of principal and interest, in consequence of which the new note and mortgage are taken for less than the amount actually due according to the basis on which their calculations are made, the sum thus omitted through mistake cannot be considered a part of the mortgage debt, as against a subsequent mortgagee, or a purchaser of the equity of redemption, whose rights intervene before the mistake is discovered and corrected..... 504

24. A compliance with the statutes of registration in relation to mortgages is equivalent to actual notice, so far as to charge a subsequent purchaser from the mortgagor.—Steele v. Adams..... 534

25. The retention of the possession of mortgaged property, by the mortgagor, after the law day has passed, is not *prima facie* evidence of fraud, nor a circumstance to which the law attaches the presumption of payment; nor is the purchaser authorized to infer payment of the mortgage debt, from the retention of possession by the mortgagor after the law day has passed, unless under such circumstances as would satisfy a jury of that fact..... 534

26. Where the mortgaged property is sold, after the law day of the mortgage has passed, under execution against the mortgagor, which came to the hands of the sheriff after the mortgage was recorded, at which sale the mortgagee is present, and does not disclose his claim, and the property is purchased by one who was not apprized of the mortgagee's presence at the sale, the registration of the mortgage operates as actual notice to

the purchaser and his privies..... 534
27. The fact that a mortgage contains a power of sale does not deprive a court of chancery of jurisdiction to foreclose.—Carradine v. O'Connor... 573
28. A mortgagee or trustee cannot deprive the mortgagor or *cestui que trust* of his equity of redemption, and create an adverse interest in himself, by a sale of the land without a decree of foreclosure and becoming the purchaser himself.—Gunn v. Brantley..... 633
29. The mortgagor may redeem at any time within the period prescribed by the statute for the limitation of rights of entry and actions for the recovery of lands..... 633
30. A mortgagee who purchases at a fraudulent sale made without a decree of foreclosure, is not entitled to compensation for improvements made by him on the land..... 633
31. When land is sold under mortgage or deed of trust, the mortgagor's right to redeem within two years, under the statute, is a mere equitable right, which can only be enforced against an unwilling purchaser in a court of equity; the mere tender of the amount required by law does not re-invest him with the legal title.—Smith v. Anders..... 781

NEW TRIAL.

1. The action of the Circuit Court in refusing to grant a new trial cannot be reviewed in the Appellate Court.—Benje v. Creagh's Admr..... 151
2. Where two or more are jointly sued in trover, and there is a verdict of guilty against one defendant, and of not guilty as to the others, the court may set aside the judgment, and grant a new trial as to the defendant who was found guilty.—Pounds v. Richards et al..... 424

NON-SUIT.

1. Before the passage of the act of February 6, 1846, (Pamphlet Acts, 35) a writ of error did not lie, to review a judgment of non-suit taken with the consent of the plaintiff; and since the passage of that act, the writ only lies where the record shows that the non-suit was taken in consequence of a decision of the court adverse to the rights of the plaintiff in error.—Tate and Tate v. McCrary..... 499
2. Where the judgment entry recites, that "the plaintiffs *voluntarily* suffered a non-suit," and neither the bill of exceptions nor any other part of the record shows that the non-suit was taken in consequence of the ruling of the court, the Appellate Court will not infer that it was taken on account of the ruling of the court adversely to the plaintiffs, from the mere fact that a bill of exceptions was taken to the ruling of the court against the plaintiffs..... 499

PARTNERSHIP.

1. Where one partner covenants in consideration of a sum of money paid him by his co-partner, to pay the debts of the firm without unnecessary delay, and without recourse on his co-partner, a failure on his part to perform the act which he had covenanted to do gives a right of action to his co-partner; and the latter may in such case file his claim against the estate of the deceased partner before he has paid any part of the partnership debts.—Hogan's Exr. v. Calvert, Admr..... 194
2. When a partnership is dissolved by the death of one or more of the part-

ners, the legal title to all the personal property and choses in action belonging to the firm becomes vested exclusively in the survivor, for the purpose of paying the debts of the firm, and distributing the residue, if any, among the parties entitled; but as to real property, the legal title to the share of the deceased partner descends to his heirs at law, and a court of law cannot regard or protect the mere equities of others.—Andrews' Heirs and Admrs. v. Brown's Admr. 437

3. In a court of equity, however, real estate belonging to the firm, purchased with the partnership funds and treated as partnership property, is considered as personal property; to this extent, at least, that it is liable to pay the debts of the firm, and the surviving partner has a claim upon it for that purpose, which is superior to the title of the widow and heirs at law of the deceased partner..... 437
4. As the surviving partner is charged with the payment of the debts of the firm, he has the right in equity to dispose of its real estate for that purpose; and, although his deed will not convey the legal title to a purchaser, yet it will convey this equity to him, and through it he may compel the heir to convey the legal title..... 437
5. Where land is purchased by a partnership at a sale made under a decree of foreclosure in chancery, and, after the death of one partner, the survivor files a bill to obtain the control of the real estate, for the purpose of paying the debts of the firm, and the land is redeemed pending the suit, the redemption money stands in the place of the land itself, and the surviving partner is entitled to it, for the purpose of paying the debts of the firm..... 437
6. The individual debt of one partner cannot be set off against a partnership debt.—Ross, Admr. v. Pearson..... 473
7. *It seems*, that when land is conveyed by deed to a firm by their firm name, the deed may be aided by parol proof showing the names of the particular individuals of which the partnership was composed.—Lindsay v. Hoke & Abernathy..... 542

PENITENTIARY.

1. Previous to the passage of the act of March 6, 1848, (Pamphlet Acts 1847-8, 121,) the physician of the penitentiary could only be removed by the inspectors, and the lessee could not avoid his liability to pay the physician's salary, by refusing to admit him into the hospital; during the physician's continuance in office, he had the right to demand and recover of the lessee a fourth part of his salary, at the end of every three months' service, notwithstanding the latter hindered him from the discharge of his official duties.—Jones v. Graham..... 654

PERSONAL PROPERTY.

1. The *cash capital* of a commercial firm, whose business "comprehends the purchase of cotton upon commission, the buying of bills of exchange (generally based upon cotton,) upon domestic and foreign places, upon which said bills of exchange and cotton they draw and sell their own bills of exchange," *is that much cash in gold or silver, ready at hand in the strong box, to be paid out for cotton purchased on commission, or in the purchase of bills of exchange;* and this "cash capital" comes under the description of "personal estate."—St. John, Powers & Co. v. The Mayor

&c. of Mobile..... 224
2. When the partners of such a firm reside in the same city in which they have their place of business, the locality of the capital on which their business is conducted is the same as the domicil of its owners..... 224
3. If personal property be given, by words that would create an estate tail at common law, if the subject of the gift were land, the remainder over is void, and the first taker takes the whole.—Powell v. Glenn et al..... 458

PHYSICIANS.

1. A note given in consideration of services rendered by the payee as a physician, when he has not obtained a license, is made void by statute, (Clay's Digest, 487,) yet if he sells drugs and medicines apart from his professional business as a physician, he may recover for them; and where they constitute a part of the consideration of the note, the true question to be determined by the jury is, whether such drugs and medicines were prescribed, administered or furnished by the payee in the capacity of physician, or sold by him as a druggist or apothecary.—Holland v. Adams... 680

PLEADING AND PRACTICE AT LAW.

1. If trespass to try title is brought to recover the freehold, and the plaintiff dies pending the suit, it may be revived in the names of his heirs at law.—Rowland & Heifner v. Ladiga's Heirs..... 9
2. The court may require some evidence of heirship, before allowing the suit to be revived, but its action in reviving without sufficient evidence of the heirship cannot be reviewed in the Appellate Court, even if the revivor is made without any proof at all; for the defendant may contest the heirship upon the trial before the jury..... 9
3. If there is no declaration, or if the declaration is fatally defective, for the want of an indispensable averment, the defendant may demur, move in arrest of judgment, or assign error.—Emanuel v. Ketchum..... 258
4. A judgment by *nil dicit* cannot cure a defective declaration; it only admits that the party has been properly brought into court..... 258
5. Where a party has a right of recovery over against another, the party thus liable may defend in any suit commenced against the person to whom he is liable; but the defence in such case is conducted in the name of the defendant on the record, and the court is not authorized to render judgment against both parties.—Cleaveland v. McAdams..... 321
6. A general demurrer must go to the whole declaration; and if the declaration be good to recover a portion of the sum sued for, the demurrer should be overruled, except in cases, if any such exist, where the entire amount must be recovered or none at all.—Pryor v. Beck..... 393
7. A variance between the writ of attachment and the bond and affidavit, if available at all to the defendant, can only be taken advantage of by plea in abatement.—Goldsticker v. Stetson & Co..... 404
8. A plea in abatement which concludes in bar is bad on demurrer..... 404
9. Where a plea in abatement of a variance sets out the attachment, bond and affidavit, but does not crave oyer of them, it is bad on demurrer... 404
10. Where two or more are jointly sued in trover, and there is a verdict of guilty against one defendant, and of not guilty as to the others, the court may set aside the judgment, and grant a new trial as to the defendant who was found guilty.—Pounds v. Richards et al..... 424

11. When the issue is made up between the plaintiff in attachment and one claiming to be the transferree of the property or debt attached, the plaintiff is entitled to open and close the argument of the case, although the issue is so framed that the transferree is made to *affirm* the fairness and good faith of the alleged transfer.—Grady's Admr. v. Hammond..... 424
12. Where a feme sole, one of several co-plaintiffs, marries, pending the suit, and her husband is not made a party, the objection, if it can avail in any case, must be taken by plea in abatement.—Powell v. Glenn et al..... 458
13. When one of several co-plaintiffs in an action of trover dies, pending the suit, and his personal representative is not made a party, the objection can only avail to reduce the amount of the recovery; and if no question is raised in the primary court touching the *quantum* of damages, the objection cannot be raised in the Appellate Court 458
14. Assumpsit and trover cannot be joined in one declaration, and such misjoinder is bad on general demurrer.—Copeland v. Flowers..... 472
15. Where the action is commenced before a justice of the peace, and removed by *certiorari* into the Circuit Court, where the plaintiff files his statement containing a count in assumpsit and a count in trover, a general demurrer will lie to it..... 472
16. Plaintiff in assumpsit cannot recover on the special counts in his declaration, when the contract proved is substantially variant from that set out.—Hopper v. Eiland..... 714
17. *It seems*, that when the contract declared on is in form a conditional note, the plaintiff can give it in evidence under the common count on an account stated, upon proof of its execution and the performance of the condition, and can recover under that count, if there is any legal impediment to his recovery on the special counts..... 714
18. To authorize the court to reject a declaration on account of a variance between it and the endorsement on the writ, the variance must be total and amount to a radical departure.—Morrison v. Taylor..... 779
19. A plea of tender is fatally defective on demurrer, when it shows on its face that the sum tendered was less than the amount due.—Smith v. Anders..... 782
20. When a tender is made after suit brought, it must be of the sum due, with interest thereon, and costs of suit; and this must be averred in the plea..... 782

PRINCIPAL AND AGENT.

1. A person dealing with one who professes to be an agent for another, is bound to know the extent of his authority; and the agency must be proved by other evidence than the acts of the supposed agent, before it can be assumed that his acts are binding on the principal.—Van Eppes v. Smith..... 317
2. An agent who sues out an attachment in the name of his principal, and executes an attachment bond purporting to bind the principal only, to which he signs his principal's name, and his own as agent, is an incompetent witness for the principal in the attachment suit.—Lankford v. Keith & Weir..... 342
3. Although it is true, as a general proposition, that money voluntarily paid for another cannot be recovered from him, yet, if the payment is sanctioned and adopted by the debtor, he thereby makes the payor his agent, and

the law then implies a promise to refund.—Ross, Admr. v. Pearson... 473
4. Authority to an agent "to settle" does not authorize him to submit to arbitration the matters in dispute.—Huber v. Zimmerman..... 486
See DEEDS AND CONVEYANCES, 1, 2, 3.

PROBATE, COURT OF.

1. The husband, who is executor of his wife, may be compelled to settle his trusteeship of her separate estate in the Court of Probate; and on this settlement, he should state with that court a full account of all moneys or other property of the wife, received by him as *corpus* or *capital* of her estate, and not as *income*, and credit himself with all proper payments or disbursements, made by him in her behalf as trustee.—Weems, Exr. v. Bryan & Wife..... 303
2. Where *ex parte* proceedings are instituted in the Court of Probate against an executor, administrator or guardian, who has removed beyond the jurisdiction of the court which granted him letters without settling his accounts, although it is necessary that the record should show the facts which invest the court with authority to state the account, yet it is immaterial whether the facts are proved before or after publication; from the time of the application, until the action of the court in stating the account, the proceedings are to be regarded as *in fieri*, and the authority on which the final action is based may be proved at any time before such action is had.—Croft v. Ferrell et al..... 351
3. Where the account is stated and reported for allowance at the next term of the court, at which term, on account of there being no judge qualified, the proceedings are irregularly continued to the next term, the appearance of the guardian to the motion against him for the allowance of the account, and his failure to object to it on account of such irregular continuance, is a waiver of it, and places him rightly in court, even if the irregular continuance amounted to a discontinuance of the proceedings.. 351
4. When an infant is interested in the settlement of an estate before the Court of Probate, it is the duty of the court to appoint a guardian *ad litem* for her, although she may have a guardian of her person and property regularly appointed, who was notified of the settlement, and failed to attend. (Overruling Parks v. Stonum, 8 Ala. 755.)—King et al. v. Collins, Admr. 363
5. The rules of practice which obtain in the Court of Chancery should be applied to the practice of the Court of Probate when they can be made to apply, in those cases where no rule of practice can be drawn from the statutes of this State or from the Ecclesiastical Courts of England..... 363
6. Whether an executor or administrator in chief who has settled with the administrator *de bonis non*, may apply to the Court of Probate for a discharge from liability to the estate, *quaere?* But conceding that he may, he should give notice of his intended application, produce his receipt showing the settlement, and move for a discharge; the court cannot, *ex mero motu*, order his discharge, upon the mere representation of the administrator *de bonis non*, upon his final settlement, that he has settled in full with the executor or administrator in chief..... 363
7. Whenever it is necessary to form an issue to ascertain whether an advancement has been made to a child, although the better practice would be, that the proceedings should be conducted in the name of the administrators as plaintiffs, and the party who contests the fact of advancement as

defendant, yet, if the record shows that the question at issue was fairly presented and correctly decided, without objection in the court below, the defendant, if the decision is against him, cannot complain that the other distributees were the plaintiffs, instead of the administrators.—Smith v. Smith's Admrs..... 761

8. If a child receives either money or property from a parent, it will be *prima facie* an advancement, unless the presumption is repelled by the nature of the property, or by some other circumstances showing that it could not have been intended for that purpose..... 761

See EXECUTORS AND ADMINISTRATORS.
" ESTATES OF DECEASED PERSONS.
" INSOLVENT ESTATES.

QUARTER MASTER GENERAL.

1. The appropriation act, approved February 10, 1852, by which the sum of two hundred dollars per annum is appropriated to the Quarter Master General, as his annual salary for the years 1852 and 1853, postpones for two years the operation of the general statute changing the compensation of that officer; and he is entitled during those years to the sum thus specifically appropriated. (Pamphlet Acts 1851–2, 83, 88, 529; and Military Code of 1851–2, 36.)—Riggs v. Pfister..... 469

REDEMPTION OF LANDS.

1. When lands sold under execution are purchased and held by the trustee of a *feme covert* in trust for her, an offer by a judgment creditor to redeem under the statute, is sufficient, if made to the trustee.—Barringer et al. v. Burke..... 765

2. An offer to redeem by a creditor who has a judgment then in force, which is afterwards reversed on error by the Appellate Court, does not entitle him to redeem under another judgment recovered on the same cause of action after the expiration of the two years..... 765

3. When land is sold under mortgage or deed of trust, the mortgagor's right to redeem within two years, under the statute, is a mere equitable right, which can only be enforced against an unwilling purchaser in a court of equity; the mere tender of the amount required by law does not re-invest him with the legal title.—Smith v. Anders..... 782

RENTS.

1. Rents received by defendant under an adverse holding, cannot be recovered by the rightful owner in assumpsit for money had and received; but if the holding is not adverse, they may be recovered in that form of action.—Price v. Pickett et al..... 741

2. The right to emblements does not obtain until the seed is sown, and does not include the costs of preparing the ground for the reception of the seed, when the term is determined by the death of the tenant for life before the seed is actually sown..... 741

3. Tenants in common of land may sue jointly in assumpsit for money had and received to recover the rents..... 741

4. When the life estate falls in before the end of the year for which the land is leased, the remainder man is entitled to the entire rents from the death of the tenant for life to the end of the year, subject to the right of em-

blements..... 741
5. When one enters into the possession of land under a contract of purchase, and afterwards agrees to pay rent for the year in consideration of the rescission of the contract, the agreement creates the relation of landlord and tenant, and gives the landlord a lien upon the crop, and the right to enforce it in a proper case by process of attachment.—Powell v. Hadden's Executors..... 745
6. The lien for rent under the statute applies to crops grown on the land after the relation of landlord and tenant is established, although they may have been planted previously to the existence of that relation..... 745
7. When the contract of purchase is rescinded after the vendee has taken possession of the land, and he agrees to pay rent for the year in consideration of the rescission, it is immaterial, so far as the landlord's lien for the rent already accrued is concerned, whether any accrues after the rescission of the contract..... 745

ROADS, BRIDGES AND FERRIES.

1. The act of 1836 (Clay's Digest, 509, § 11,) authorizes the judge of the County (now Probate) Court, and makes it his duty to fill any vacancy that may occur in the office of overseer of roads, from whatever cause, after a regular appointment has been made.—Thompson v. The State.. 48
2. The true distinction between those irregular appointments to office which are void, and those which are voidable only, seems to be this: where the authority under which the officer assumes to act, shows upon its face that it emanates from a power which had no right to confer it, it is void; but where it is regular on its face, and emanates from a source which has the legal or constitutional right to bestow it, and it requires a resort to facts not disclosed in the commission or order of appointment, to show that the power of appointment has been illegally or irregularly exercised, the appointment is voidable only..... 48
3. When an overseer of a road has been regularly appointed by the Commissioners' Court, and afterwards another overseer is appointed by the Judge of Probate, as in case of a vacancy, and the latter appointment is regular on its face, the person thereby appointed is *de facto* the overseer of the road, and his acts in opening it are valid as to the public and third persons, although the former is the overseer *de jure*..... 48
4. When a person is indicted for obstructing a public road opened by an overseer *de facto*, he cannot defend his own misdemeanor under the overseer's supposed want of authority, although the obstruction consisted in putting up his own fences, which the overseer had pulled down in opening the road..... 48
5. It is no objection to the regularity of the appointment, that it is tested by the Judge of Probate *as clerk*..... 48
6. When application is made to a circuit judge for a *certiorari*, to review the proceedings of the Commissioners' Court in the establishment of a road, the petitioner *prima facie* shows *legal* injury, by showing that the road was illegally established, and that it runs through his land; and the writ should be granted.—Ex Parte Keenan..... 558
7. The only case in which the Commissioners' Court has power to revoke a ferry license, is that given by the statute, (Clay's Digest, 513, § 26,) where the grantee fails to renew his bond, after receiving ten days' no-

tice to do so; and the proceedings must show this notice, before the jurisdiction of the court begins. But it has no power to take a ferry from one who is in the enjoyment of it, and grant it to another, upon the petition of the latter showing a vested right in himself to the franchise.—Lamar v. Commrs' Court of Marshall County..... 772

8. *It seems*, that the petitioner's remedy, in such case, is, a proceeding in the nature of a *quo warranto*, before the tribunal having jurisdiction of the subject-matter..... 772

SCIRE FACIAS.

1. In *scire facias* at common law, the plaintiff may treat the *sci. fa.* as a writ simply, and declare upon it, or he may make it stand in the place of both writ and declaration; but in the latter case, the writ must contain the averments which are necessary to make a declaration good.—Emanuel v. Ketchum..... 257

2. This rule of the common law is not at all affected by the statute of this State, respecting judgments *nisi*, and *scire facias* thereon, against a defaulting witness in a civil case..... 257

3. A *sci. fa.* against a defaulting witness should set out the *subpœna*, either *verbatim* or substantially, and aver that it was served. It should also contain an averment showing at what day and term the witness was bound to appear, or it is fatally defective..... 257

4. If there is no declaration, or if the declaration is fatally defective, for the want of an indispensable averment, the defendant may demur, move in arrest of judgment or assign error..... 257

5. A judgment by *nil dicit* cannot cure a defective declaration; it only admits that the party has been properly brought into court..... 257

6. Where judgment by *nil dicit* is rendered on a *scire facias* against a defaulting witness, the judgment will be reversed on error assigned in the Appellate Court, if the *scire facias* is fatally defective for the want of necessary averments..... 257

7. In *scire facias* against a defaulting witness, where no declaration is filed on the return of the writ, the writ itself must show, by positive averment, that a subpœna had been issued and served, and then set out the judgment *nisi* in substance; the writ is insufficient if it only sets out the judgment *nisi*, which recites that the plaintiff appeared and *suggested to the court* that a subpœna had been issued and returned executed.—Spence v. Simmons..... 563

SET-OFF.

1. The individual debt of one partner can not be set-off against a partnership debt.—Ross, Admr. v. Pearson..... 473

SHERIFFS.

1. When an execution comes to the hands of a sheriff after the expiration of his term of office, he has no more authority to levy it than any other private individual; and if he levies upon and sells the defendant's property by virtue of it, he is liable in trover or trespass.—Andress v. Broughton. 200

2. In such case, the defendant will not be held to have waived the tort, by being present at the sale and asking a postponement of it, and by requesting the sheriff not to pay over the money arising therefrom to the

plaintiff in execution, when it is not shown that he was aware of the want of authority on the part of the sheriff..... 200
3. The securities of a sheriff are not responsible on their bond for money received by him on an execution which came to his hands after the expiration of his term of office and before his successor was qualified, although during the interval he was sheriff *de facto*.—Cuthbert v. Huggins..... 349
4. The fact that the execution was issued on a forfeited forth-coming bond, which had been taken under a levy made on a former execution, which had come to the sheriff's hands before the expiration of his term of office, does not affect the case..... 349
5. Under the act of February 11, 1850, (Pamphlet Acts, 34,) which abolished the County Courts, the Circuit Court has jurisdiction of a motion against a sheriff for failing to pay over money collected on an execution which was issued from the County Court before its abolition.—Kavanaugh v. State Bank..... 563

SLANDER.

1. Words spoken by defendant of and concerning plaintiff, charging him with having beaten his wife so that he made her miscarry, are not actionable; they do not, of themselves, and without an innuendo, amount to more than a charge that plaintiff committed an assault and battery on his wife.—Dudley v. Horn & Wife..... 379

SLAVES AND FREE NEGROES.

1. A bequest of freedom to a slave is void, in consequence of his incapacity to take under the will.—Roberson's Heirs v. Roberson's Executors..... 273
2. Slaves to whom the testator attempted to bequeath their freedom go to the residuary legatee under the will, and not to the heirs at law as property undisposed of by the will..... 273
3. At common law, the right to inherit was dependent upon the duties which devolved on the natural born subject, in return for the protection supposed to be afforded him by the sovereign, and sprang directly from the obligation of fealty, which, under the feudal system, was required of the vassal: and, although the reasons on which the rule was founded have in a great measure ceased, yet the rule still exists, and under its operation all persons entitled to take by inheritance at the common law possess the same right in this State, unless inhibited by our statutes, either expressly or by necessary implication.—Tannis v. Doe ex dem. St. Cyre..... 449
4. Previous to the act of February, 1832, a free negro might inherit lands in this State; whether he can inherit where the descent was cast upon him after the passage of that act, and he was not a resident of this State on the first of February, 1832, *quaere?*..... 449
5. A slave who was emancipated prior to the passage of the act of 1834, (Clay's Digest, 545, §§ 37, 38,) may hold lands in this State..... 449
6. A free negro, who was an inhabitant of Florida at the date of the treaty by which Spain ceded that territory to the United States, lost the character of an alien, by the operation of that treaty, and would be entitled to take lands by descent in the United States, if not incapacitated by the laws of the State in which the lands were situated..... 449
7. It is at least very questionable, whether slavery, as it exists among us, was not at one period recognized in England by the common law.—At-

wood's Heirs v. Beck, Admr. 590

8. Slaves are now regarded by our law as chattels, and their owners have an absolute, unqualified property in them; and although this right may not have been recognized by the ancient common law, yet such is the genius and expansive nature of the common law, that it adapts itself to the necessities and exigencies of society, and when a new species of property is introduced, and the statute law is silent as to the rules by which it is to be governed, the rules of the common law are applied to it, modified, of course, according to the nature of the property 590

9. As between master and slave, aside from all statutory prohibition, the right of manumission exists, and is deducible not only from the absolute ownership of the master in his slave as a chattel, but from analogous rules applicable to slavery as it has obtained in every civilized country .. 590

10. The constitutional provision respecting the emancipation of slaves, and the several statutes in relation thereto, amount to a prohibition of the right of emancipation in this State, except in the mode pointed out by statute 590

11. Questions of State policy can only be determined by the courts, from the provisions of the Constitution and the acts of the Legislature 590

12. There is no restriction or prohibition, in the Constitution, the statutes or the decisions of this State, upon the power of the owner to remove his slaves to a non-slaveholding State, by himself, his agent or his personal representative 590

13. A bequest to certain slaves was as follows: "To each and all of the before-mentioned children I give and bequeath the sum of $8000 each, to be appropriated and invested in such manner as hereafter described, the same being invested in the hands of my executors, for the special benefit of the said children as aforesaid; and the bondage and slavery to which said children, by the laws of the State, are subjected, I hereby invest in the hands of my executors, for the purpose of my said executors removing said children, viz: (naming them) to a free State; the others, to wit: (naming them) being already in a free State, from which they are not to be removed into any slave State; it being my desire to give to each and all of the children before-named their freedom, as also the sum of $8000, to be invested as hereinafter named," viz: one-half in lands in Indiana, Illinois or Michigan, and the other half to be loaned out on good individual security, additionally secured by mortgage on real estate; the titles to said lands, and the bonds for said moneys, to be delivered to the said legatees, when they shall have been removed to a non-slaveholding State. *Held:*
That the legacies and trusts were valid, as to all the negroes; and that the Court of Chancery will not interfere, at the suit of the testator's residuary legatee, to prevent the trustee from carrying out the lawful desire of the testator 590

SUPERSEDEAS.

1. A petition for a *supersedeas* is demurrable, when the alleged grounds of relief go to matters behind the judgment.—Marshall v. Caudler 490

SURETIES.

1. Sureties have the right to claim contribution from each other, in propor-

tion to the amount paid by each on the common debt; and this right is the result, not of any implied contract between the parties, but of an acknowledged principle of natural justice, which requires that those who voluntarily assume a common burden should bear it in equal proportions. —White v. Banks..... 705

2. If a surety obtains indemnity, for a consideration paid by him, his co-surety cannot claim the benefit of the indemnity without paying his proportion of the consideration; and if an offer of security be made to them by the principal, upon condition that they should execute a release, which offer is accepted by one, and refused by the other, though the latter would have the right to demand that the proceeds of the securities received should be applied to the reduction of the common debt, yet such proceeds could in no other way inure to his benefit; and the payment would discharge the former from contribution, if it amounted to his proportion of the common debt..... 705

3. A firm made an assignment for the payment of their debts, fraudulent on its face as to creditors, providing that the creditors should, within a specified time, execute the deed and release the assignors, or should receive no part of the proceeds of the trust property, and reserving to the grantors that portion of the proceeds which would have been distributed among the refusing creditors if they had executed the deed. Among the debts thus secured was a note held by the Bank, on which there were two sureties, one of whom executed the deed and released the assignors, while the other refused. The former realized, from the proceeds of the assignment, more than his proportion of the common debt, and applied the amount so received to its reduction. The Bank obtained judgment for the balance of the debt against the other surety, who discharged the same, and then moved for a summary judgment against his co-surety. *Held:*

That he had no claim to contribution under these circumstances..... 705

4. A surety who is fully indemnified by his principal cannot recover contribution from his co-surety for money paid by him, but must indemnify himself out of the means placed in his hands.—Morrison v. Taylor..... 779

TRESPASS AND TROVER.

1. When the defendant in trover fails to give any account of the manner in which he acquired possession of the slave in controversy, he will be presumed, in the absence of all rebutting proof, to hold from or under the person who is shown to have had the possession for several years next before the defendant acquired it.—Barnes & Barnes v. Mobley..... 282

2. The declaration of one in possession of a slave, *made at the time of hiring* her to the witness, "that the slave belonged to the plaintiffs, who were minors and orphans," is admissible evidence for the plaintiffs, in an action of trover subsequently instituted by them for her conversion against a third person, as showing that he was but the plaintiffs' bailee, and held the slave in that capacity, in subordination to their title, and not adversely to them..... 282

3. In trespass against defendant for taking plaintiff's horse, defendant pleaded justification under legal process, to which plaintiff replied specially that at the time of the levy he had a family and but the one horse levied on, which was protected by law from levy and sale. *Held:*

That the replication admitted the validity of the writ and the capacity of the person by whom it was levied to execute it, and only raised the question whether the horse was subject to the levy; and though the proof showed that the plaintiff in the writ was the person who executed it, and the court charged the jury that the levy was valid though made by the plaintiff in the writ, yet it was error without injury, and the judgment would not be reversed.—Boykin v. Edwards..... 261

4. Where two or more are jointly sued in trover, and there is a verdict of guilty against one defendant, and of not guilty as to the others, the court may set aside the judgment, and grant a new trial as to the defendant who was found guilty.—Pounds v. Richards et al..... 424

5. In trespass *quare clausum fregit*, for injury to the possession, if no actual possession is shown, the right of recovery depends upon the title, which draws to it constructive possession.—Shipman v. Baxter..... 456

6. If the defendant relies upon the adverse possession of himself and those under whom he claims, he must show an actual possession of the *locus in quo*, or of some part of a legal sub-division of which it formed a portion..... 456

7. In trespass *quare clausum fregit*, for cutting trees, where neither party is shown to have had actual possession of the land, it is erroneous to instruct the jury, that defendant would not be liable for the act complained of, if he did it "in the *bona fide* assertion of a claim of title, which he thought to be good;" his liability would depend on the strength of his title compared with that of the plaintiff's, and not on his own opinion of its strength..... 456

8. When one of several co-plaintiffs in an action of trover dies, pending the suit, and his personal representative is not made a party, the objection can only avail to reduce the amount of the recovery; and if no question is raised in the primary court touching the *quantum* of damages, the objection cannot be raised in the Appellate Court.—Powell v. Glenn et al.. 458

9. Where a tort is committed by the taking at one time of several chattels, the property of one person and in his possession at the time, it gives him but one cause of action, and he cannot be allowed to split it up and bring separate suits for separate articles, although he was possessed of some as trustee, and of others in his own right.—O'Neal v. Brown..... 482

10. And if the plaintiff in such case, first declaring as trustee, recovers in trespass for the taking of the goods which belonged to him as trustee, and brings another action for the goods which belonged to him individually, the record of the former judgment sustains the plea of a former recovery, and bars a second recovery..... 482

11. In trover for the conversion of a promissory note, the evidence showed "that the note was traded to defendant by plaintiff for a wagon and oxen, with a reservation on the part of the plaintiff, that he should at any time before the note fell due, have the privilege of redeeming it, by paying the defendant fifty-five dollars." *Held:*

1. That the court could not infer that the note was endorsed absolutely to the defendant, so as to vest in him the legal title, and thereby prevent a recovery by plaintiff;

2. That the tender of the money within the specified time, and demand of the note, gave the plaintiff the immediate right of possession.—Trulove v. Brown..... 544

12. In actions of trespass, if the damages assessed do not exceed five dollars, the plaintiff can recover no more costs than damages, unless the presiding judge will certify that the jury ought to have awarded greater damages. (Clay's Digest 316.)—Galle et al. v. Lynch..... 579
13. Trespass will not lie for an act done under a process which is valid on its face, and which regularly issues from a court of competent jurisdiction; but if the court which issued the process had no jurisdiction, it is void, and furnishes no protection either to the officer executing or the court issuing it.—Sasnett v. Weathers et al..... 673

TRESPASS TO TRY TITLES.

1. If trespass to try title is brought to recover the freehold, and the plaintiff dies pending the suit, it may be revived in the names of his heirs at law. Rowland and Heifner v. Ladiga's Heirs..... 9
2. The court may require some evidence of heirship, before allowing the suit to be revived, but its action in reviving without sufficient evidence of the heirship cannot be reviewed in the Appellate Court, even if the revivor is made without any proof at all: for the defendant may contest the heirship upon the trial before the jury..... 9
3. One who has title to land may bring one suit against all the tenants in possession of it, although they may severally possess distinct portions of it; and the defendants may protect themselves from a joint judgment for damages by showing the character and extent of their possession..... 9
4. When several plaintiffs join in an action of trespass to try titles, a deed conveying the land in controversy to some of them is admissible evidence for the grantees therein named; and therefore a motion to exclude it entirely may be refused.—Lindsay v. Hoke & Abernathy..... 542

TRIAL OF THE RIGHT OF PROPERTY.

1. On a trial of the right of property, between the plaintiff in execution and one claiming under a purchase from the defendant, the declaration of the defendant, that the sale was fraudulent, made when he was not in possession of the property, and when the claimant was not present, is *prima facie* inadmissible against the claimant, in the absence of proof connecting him with the fraud.—Bilberry, Admr. v. Mobley, Use. &c..... 277
2. In a claim suit under the statute, although the claimant cannot defeat the execution by interposing the title of a third person, yet where he himself has an undivided interest in the property, as where it belongs to him and a third person, a stranger to the suit, he may interpose his title, and thereby defeat the execution.—Cotten v. Thompson..... 574
3. A claimant deriving title to the slave in controversy from the defendant in execution, partly by gift and partly by purchase, consummated before the lien of the execution attached, must be regarded, in a court of law, as a purchaser for a valuable consideration, no fraud being shown in the transaction by which he acquired title.—Taylor v. Br. Bk. Huntsville.... 581
4. In a trial of the right of property, the assessment by the jury of the value of the property is mere surplusage.—Powell v. Hadden's Exrs 745

VERDICT.

1. In case for malicious prosecution, it was consented, at the close of the trial, that the clerk might receive the verdict; during the recess of the court.

the jury returned their verdict to the clerk as follows: "We, the jury, find for the plaintiff, and assess his damages at $2,500," and requested him to have it put in proper form by the court, if it was not correct, after which they were discharged for the day, and separated; the jury were in court the next morning, and renewed their request to the court, whereupon the court, against the defendant's objection, directed the verdict to be entered in proper form. *Held:*

That there was no error in the alteration of the verdict.—Ewing v. Sanford..... 157

WARRANTY.

1. A bill of sale for a slave, a boy eight years of age, contained the following warranty: "I also do warrant Joe to be sound in mind and body, with the exception of his legs; and I do hereby bind myself, that, if his legs should injure him from being a serviceable boy at the age of fifteen years, to make him good." In an action for a breach of this warranty, *it was held:*

1. That the meaning of the warranty was, that if the injury to the boy's legs should *lessen his capacity for service at the age of fifteen*, the vendor should make good that injury; and not, that the boy should have, at that age, a *market value*, equal to that of a boy capable of doing ordinary service on a plantation;
2. That the measure of damages was, the difference between the boy's actual value at the age of fifteen, and what would have been his value if the injury to his legs had not lessened his capacity for performing the services usually rendered by slaves of that age;
3. That evidence as to the boy's situation, both before and after the specified time, to-wit: when he arrived at the age of fifteen, but not so remote as to furnish no reasonable presumption as to his condition at that time, was admissible;
4. That proof that plaintiff had allowed the witness to have the boy's services gratuitously during the year before the trial, was inadmissible as evidence.—Gingles v. Caldwell..... 444

WILLS.

1. A testator, under our statute, can only defeat his heirs at law or distributees by making a distribution of his property; and if any portion of it remain undisposed of by will, the heirs at law or next of kin are entitled to it, notwithstanding it may appear that the testator did not intend that they should succeed to it.—Denson and Wife v. Autrey's Exr..... 205
2. A bequest of freedom to a slave is void, in consequence of his incapacity to take under the will.—Roberson's Heirs v. Roberson's Executors..... 275
3. Slaves to whom the testator attempted to bequeath their freedom go to the residuary legatee under the will, and not to the heirs at law as property undisposed of by the will..... 273
4. On the trial of an issue *devisavit vel non*, between the executor, who was also the principal legatee, and another legatee, the declarations or admissions of the executor cannot be received to invalidate the will, which makes provision for himself and several others, even when offered in connection with proof that it would be to the interest of all the legatees, except the executor, to set it aside.—Bunyard and Wife v. McElroy, Exr. 311

5. Nor are the declarations of the testator, made by him some six or seven years before the execution of his will, that the executor and his wife "were constantly *ding donging* at him to make a will, but that he would not do it, and never meant to do it; that the law of Alabama would make a good enough will for him," admissible evidence against the executor..... 311
6. The law does not require that the proof of undue influence should be confined to the time of the execution of the will; yet the party offering such proof must show, that it is so connected with the act done as to furnish some reasonable ground of inference that the act was influenced, in whole or in part, by it..... 311
7. Where a testator devises and bequeaths to his children a certain portion of his real estate and all of his personal estate, "to be distributed when required, at mature age or majority, in equal parts," the authority to make distribution confers upon the executor a naked power merely, uncoupled with any interest, and, in the absence of a devise to him or words of implication, gives him no right to the possession or control of the lands.—Chighizola v. LeBaron, Exr..... 406
8. In such case, the word "distributed" simply postpones the division of the estate to the time fixed by the will; and until that time arrives, and the real estate is divided, the devisees take as tenants in common..... 406
9. The statutes of this State authorizing an executor to sell or rent the lands of the testator do not, of themselves, intercept the passing of the estate to the heirs or devisees, who may assert their title, with all its incidents, until the executor exerts the power reposed in him by the statute..... 406
10. The power to rent, conferred by statute upon the executor, is a bare authority, and must be strictly pursued; and if the lands are not leased at public outcry, according to the requisitions of the statute, it cannot be regarded as a due execution of the power, and does not in any manner affect the rights of the devisees..... 406
11. Where the same clause of a will contains both a devise and a legacy to the children of the testator, "to be distributed when required, at mature age or majority, in equal parts," and present words of bequest are used, the word "distributed," with reference to the personal property, will be construed as synonymous with "divided," and as postponing, not its distribution, but its division among the legatees, until the period fixed by the testator..... 406
12. If personal property be given, by words that would create an estate tail at common law, if the subject of the gift were land, the remainder over is void, and the first taker takes the whole.—Powell v. Glenn et al..... 458
13. Although the words "heirs of the body" ordinarily create an estate tail, yet they may be restricted and explained by other expressions; and if, from such expressions, the testator's intention appears to have been, that the estate of the first taker should cease with his life, and the property should then vest in his children, or, in default of children at the time of his death, then over to another, the remainder is good, and the words will be construed as words of purchase and not of limitation..... 458
14. Where a testator, by one clause of his will, bequeathed certain slaves to each of his daughters, and to the heirs of her body begotten, and, by another clause, declared his intention to be as follows: "That the negroes willed and devised to my two daughters as above, are for their support

and maintenance, and to the support and maintenance of the heirs of their bodies begotten, or to be begotten, and to descend directly after their death to the heirs of their bodies begotten. If either of my daughters above named should die without an heir of their body begotten, then, and in that case, the property so willed to them, or to the one that may so die without an heir, shall pass off, and become the property of my surviving daughter and my two sons, or their heirs; each one to have a share alike in the property so willed to the one so dying without heirs." *It was held:*

That the words "*heirs of the body*," as used in this will, were synonymous with "*children*," and that the remainder over was good. (Reaffirming Graves v. Williams, 17 Ala. 62.)..... 458

15. When the legal title to slaves bequeathed is vested by the will in the executors, as trustees, the title of the trustees will not be continued beyond the time contemplated by the will for its determination..... 458

16. A testator, by the first clause of his will, bequeathed sixteen negroes specifically to his wife, and, by other clauses, made absolute specific bequests to four of his daughters, giving to one eleven negroes, to another four, and to another two. The residuary clause was as follows: "It is my will and desire, that my beloved wife have the residue and remainder of my estate, both real and personal, during the term of her natural life, and that no sale or alteration of my plantation, stock, household furniture, or any other thing shall accrue, until her death; then it is my will and desire, that *my negroes be divided between my five daughters*, share and share alike, for their use during the term of their natural life, and not subject to the debts of their husbands, or any future husbands, and at their deaths to their heirs forever; and it is further my will and desire, that the residue and remainder of my estate, both real and personal, be divided between my four daughters, viz:" &c. *Held:*

That the negroes mentioned in the residuary clause were those which were specifically bequeathed to the wife by the first clause, or included such slaves only as were not specifically bequeathed; and that the residuary clause did not embrace the slaves specifically bequeathed to the daughters, so as to give them a separate estate therein.—Frierson v. Frierson..... 549

17. A suit cannot be maintained for a legacy, until the will has been admitted to probate; and, as the sentences of foreign courts do not operate beyond the limits of their jurisdiction, except as evidence, the probate of a will in Cuba confers no authority to proceed upon it as a will in this State, for the recovery of a legacy, although it might be evidence upon which to have the will admitted to probate here.—Moore, Admr. v. Lewis. 580

18. A decree of the Court of Probate admitting a will to probate without notice to the testator's widow, is erroneous.—Stapleton v. Stapleton.... 587

19. A bequest to certain slaves was as follows: "To each and all of the beforementioned children I give and bequeath the sum of $8000 each, to be appropriated and invested in the manner as hereafter described, the same being invested in the hands of my executors, for the special benefit of the said children as aforesaid; and the bondage and slavery to which said children, by the laws of the State, are subjected, I hereby invest in the hands of my executors, for the purpose of my said executors removing said children, viz, (naming them) to a free State; the others, to-wit: (nam-

ing them) being already in a free State, from which they are not to be removed to any slave State; it being my desire to give to each and all of the children before-named their freedom, as also the sum of $8000, to be invested as hereinafter named," viz: one-half in lands in Indiana, Illinois or Michigan, and the other half to be loaned out on good individual security, additionally secured by mortgage on real estate; the titles to said lands, and the bonds for said moneys, to be delivered to the said legatees, when they shall have been removed to a non-slaveholding State. *Held:* That the legacies and trusts were valid, as to all the negroes; and that the Court of Chancery will not interfere, at the suit of the testator's residuary legatee, to prevent the trustee from carrying out the lawful desire of the testator.—Atwood's Heirs v. Beck, Admr. ... 590

20. Land warrants, granted under the acts of Congress, unless specifically devised, pass to the heirs at law ... 590
21. Only such real estate as is owned by the testator at the time of the execution of his will passes under it ... 590
22. The general rule is, that if a devise be to one and his children, and he has children at the date of the will and at the death of the testator, the parent and children living at the testator's death take jointly under the will, if there is nothing in the will from which it can be inferred that the testator intended the interest of the children to be postponed until after the death of their parent.—Nimmo v. Stewart ... 682
23. *It seems*, that the rule is the same, if there are no children at the date of the will, but some are afterwards born and in life at the testator's death. 682
24. A bequest was in these words, viz: "I commit to my three sons, (naming them,) as trustees for my daughter Rhoda and her children, during her, the said Rhoda's, natural life, the ten following negroes," &c., "and my will and desire is, that the profits arising from the aforesaid property, either by hiring or otherwise, shall be applied to the benefit of the said Rhoda and her children; and after the decease of my said daughter Rhoda, my desire is, that what I have left her upon trust shall be equally divided between the heirs of her body, share and share alike, to them and their heirs forever." *Held:* That the children of Rhoda took an immediate and joint interest with their mother on the testator's death ... 682

WITNESS.

1. A *sci. fa.* against a defaulting witness should set out the *subpœna*, either *verbatim* or substantially, and aver that it was served. It should also contain an averment showing at what day and term the witness was bound to appear, or it is fatally defective.—Emanuel v. Ketchum ... 258
2. Where judgment by *nil dicit* is rendered on a *scire facias* against a defaulting witness, the judgment will be reversed on error assigned in the Appellate Court, if the *scire facias* is fatally defective for the want of necessary averments ... 258
3. In reviewing the decision of an inferior court upon a question as to the competency of a witness, the Appellate Court will only look to the facts disclosed to that court, and will not consider other facts which were not brought to its view.—Lankford v. Keith & Weir ... 342
4. But when the incompetency of the witness is made to appear, in part by the record or the papers of the cause, and in part by parol proof, the

Appellate Court will not infer that the court below looked only to the parol proof, irrespective of the record; especially, where the parol proof points to the particular paper in the cause which shows his interest.... 342

5. An agent who sues out an attachment in the name of his principal, and executes an attachment bond purporting to bind the principal only, to which he signs his principal's name, and his own as agent, is an incompetent witness for the principal in the attachment suit..... 342

6. The answer of a party to interrogatories filed to him under the statute stands upon precisely the same ground as an answer to a bill in chancery for a discovery; if the opposite party introduces them, he admits that the respondent is worthy of credit, and cannot impeach him.—Wilson v. Maria..... 359

7. But using the answer of a party does not make it conclusive evidence; it is to be treated like the testimony of any other witness, and is to prevail when it is not outweighed, in whole or in part, by other testimony; and, although a party will not be allowed to impeach the *general reputation* of his witness for truth, yet he will not be precluded from proving the truth of any *particular fact in direct contradiction* of what the witness may have testified; and this, not only when it appears that he was innocently mistaken, but even when the evidence may collaterally have the effect of showing that he was generally unworthy of belief..... 359

8. In assumpsit to recover money paid by plaintiff, as defendant's security on his official bond as deputy marshal, the marshal is a competent witness for plaintiff, the money having been paid upon a compromise in full discharge of plaintiff's liability on said bond.—Love v. Dargan..... 583

9. The statute imposing a forfeiture on a defaulting witness (Clay's Digest, 599, § 21,) of one hundred dollars, does not give the party summoning the witness any right to this sum, by way of satisfaction for the injury which he may have sustained; but it is imposed as a punishment upon the delinquent, for his disobedience to the process of the court, and is bestowed gratuitously as matter of good policy, upon the party summoning him.—Maclin et al. v. Wilson..... 670

10. A defaulting witness may excuse himself, by showing that, in failing to attend, he was not guilty either of negligence or wilful disobedience; and this should be the limit of the power of the courts below in allowing excuses..... 670

11. A bailee who is guilty of a conversion by selling or exchanging the property committed to him, is a competent witness for his bailor, in detinue for its recovery, his interest being exactly balanced.—Oliver v. McClellan. 675

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